Supreme Court, U.S.
FILED

No. 991140 JAN - 5 2000

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In The

Supreme Court of the United States

AARON THOMAS TALLAKSON, DAMON CHAPPIE, MARK HELM, TRINA GERALDO, ANDREW SCHOCH, PHOENIX LINDGREN, MICHAEL AKERS, MICHAEL STEVEN DAVON, MARION BARRETT, MARY AND MICHAEL CASTILLE, PHILLIP CAMPBELL, HEIRS OF HENRY LAY, SHAWN A. ROBISON AND JANE DOE,

Petitioners,

v.

BAXTER HEALTH CARE CORPORATION, BAYER CORPORATION, ALPHA THERAPEUTIC CORPORATION AND RHONE-POULENC RORER, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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144 pp

QUESTIONS PRESENTED

Does final approval of a class action settlement forever bar all future attempts by unnamed class members to assert that the settlement is not binding upon them on due process grounds?

Do unnamed class members have a right in subsequent proceedings to contest the jurisdiction of the court which has approved a class action settlement which purports to bind them?

Does the All Writs Act afford a federal court the authority to enforce a class action settlement when conclusion of the settlement is hinged upon "voluntary" acceptance of a release which goes beyond the terms of the court-approved settlement and which requires that the releasor warrant, under oath, that his or her signature on the release is not in any way influenced by the court's approval of the settlement or its anti-suit injunction?

PARTIES INVOLVED AND CORPORATE DISCLOSURE

A) *Parties*

(1) Rhone-Poulenc Rorer, Inc.
(2) Armour Pharmaceutical Company
(3) Bayer Corporation
(4) Baxter Healthcare Company
(5) Alpha Therapeutic Corporation
(6) Aaron Thomas Tallakson
(7) Damon Chappie
(8) Mark Helm
(9) Trina Geraldo
(10) Phoenix Lindgren
(11) Michael Akers
(12) Michael Steven Davon
(13) Marion Barrett
(14) Mary and Michael Castille
(15) Phillip Campbell
(16) Heirs of Henry Lay
(17) Shawn A. Robison
(18) Jane Doe

B) *Corporate Information*

(1) Rhone-Poulenc Rorer, Inc.
   (a) Rhone-Poulenc Rorer Inc.'s parent is Rhone-Poulenc S.A.
   (b) No publicly held companies own 10% or more of the stock of Rhone-Poulenc Rorer Inc., except its parent Rhone-Poulenc S.A.
(2) Armour Pharmaceutical Company
   (a) Armour Pharmaceutical Company's parent is Rhone-Poulenc Rorer International (Holdings) Inc.
   (b) No publicly held companies own 10% or more of the stock of Armour Pharmaceutical Company. Rhone-Poulenc Rorer, Inc.,

PARTIES INVOLVED AND CORPORATE DISCLOSURE – Continued

which owns 100% of the stock in Armour Pharmaceutical Company's parent Rhone-Poulenc Rorer International (Holdings) Inc., has issued shares of stock to the public.

(3) Bayer Corporation
   (a) Bayer Corporation's parent is Bayer A.G.
   (b) Bayer A.G. owns 100% of the stock of Bayer Corporation.

(4) Baxter Healthcare Corporation
   (a) Baxter Healthcare Corporation's parent is Baxter International, Inc.
   (b) Baxter International, Inc. owns 100% of the stock of Baxter Healthcare Corporation.

(5) Alpha Therapeutic Corporation
   (a) Alpha Therapeutic Corporation's parent is Green Cross Corporation of America.
   (b) Green Cross Corporation of America owns 100% of the stock of Alpha Therapeutic Corporation.

C) *Law Firms*

(1) Rhone-Poulenc Rorer, Inc. and Armour Pharmaceutical Company Sidley & Austin

(2) Bayer Corporation
   (a) Geoffrey R.W. Smith, Esq.
   (b) O'Conner, Cohn, Dillon & Barr

(3) Baxter Healthcare Corporation
Dechert, Price & Rhoads

(4) Alpha Therapeutic Corporation
   (a) Bartlitt, Beck, Herman, Palenchar & Scott
   (b) Bell, Knapp and Peterson

(5) Plaintiffs
   (a) Barham & Arceneaux

PARTIES INVOLVED AND CORPORATE DISCLOSURE – Continued

(b) Napoli, Kaiser and Bern
(c) Mull & Mull
(d) Baum, Hedlund, Aristei, Guilford & Downey
(e) Bowers, Orr and Dougal

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATES JUSTICES OF THE UNITED STATES:

Petitioners, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this matter on October 7, 1999.

CITATION OF LOWER COURTS' OPINIONS

The district court order in this case, entered on March 3, 1999 in *Walker v. Bayer Corporation*, No. 96-C-5024 (N.D. Ill.), is unreported. It is reproduced in the appendix hereto at App. 3-9.

The decision of the United States Court of Appeals for the Seventh Circuit, entered on October 7, 1999, is unreported. It is also reproduced in the appendix at App. 1-2.

STATEMENT OF JURISDICTION

This is an appeal from an order entered by the United States District Court for the Northern District of Illinois. Jurisdiction was based upon 28 U.S.C. § 1332. Appeals were taken on March 22, 1999 and April 2, 1999. The district court's decision was affirmed by the Seventh Circuit on October 7, 1999. This Court's jurisdiction to review those decisions is based on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

Article III, § 2, Clause 1 of the United States Constitution provides, in relevant part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority . . .

STATEMENT OF THE CASE

Hemophilia is a hereditary bleeding disorder in which, due to certain protein deficiencies in the blood, the blood has difficulty clotting, or in the extreme case, is unable to clot. The centuries old traditional treatment for hemophilia included ice, meditation, pressure, and decreased physical activities. Cryoprecipitate, that portion of the plasma that contains the necessary proteins in highest concentrations, was fractionated from plasma beginning in the mid-1960s, and allowed hemophiliacs to infuse the necessary components of the blood of a few donors in order to supply the deficiency in their own. Beginning in the early 1970's, the plasma from tens of thousands of donors was pooled together in large vats, and Factor VIII and Factor IX (the proteins missing from hemophiliacs' blood) was fractionated, distilled, turned into a powder, and distributed to hemophiliacs to reconstitute with saline solution for in-home injection. So effective was the new treatment that hemophiliacs were

routinely encouraged to infuse factor concentrates "prophylactically," regardless of whether they were experiencing internal or external bleeds. The demand for the products was so high that supply for the burgeoning market was made by drawing significant quantities of plasma from donors that were well-known, based upon epidemiological studies published in the 1970's, to be at the highest risk for hepatitis and any other blood-borne pathogen that might appear in the blood supply. Hemophiliacs did not know that the plasma pools included plasma drawn from prisons, paid donor centers located in central cities catering to a largely transient clientele, and from donor centers designed to attract promiscuous gay men, whose plasma was highly valued because of its high-titers of viral antibodies used to produce immune gamma globulins. While the FDA and CDC knew that these types of donors were not automatically excluded from the plasma pools, neither was aware of the practice of intentionally soliciting plasma from such donors for use in factor concentrates for hemophiliacs, in rather significant proportions.

Thus it was inevitable that when AIDS, first known as GRID (Gay Related Immune Deficiency) appeared, it shortly thereafter swept through the hemophilia population like wild-fire. Each hemophiliac was infusing, several times a month, a product that exposed him to tens of thousands of donors in each infusion, among which were the persons in which GRID first appeared and who were at highest risk for the pandemic. Ultimately, AIDS decimated the hemophilia community. Virtually an entire generation of men were wiped out, and infected wives

and children resulted in the loss of, in far too many instances, entire families.

The four respondents herein are the U.S. firms which manufacture factor concentrates. They were all made defendants in a national class action suit, which alleged that they were grossly negligent in the collection of plasma which should have been rejected as at highest risk for any pathogen, known or unknown, which might appear in the blood supply, a probability that was far from remote given the testimony of Dr. Luc Montaigner, discoverer of the HIV virus that it was well known from the early 1970's that there would be "new" pathogens that would appear in the blood supply which would cause all manner of human disease and death. The suit also alleged that the defendants failed to take any precautionary measures to minimize the risk of their use of high-risk plasma, such as heating the plasma. Heat treated plasma, a relatively simple procedure that basically involves bringing the plasma to 60°-68° centigrade for a defined period, was implemented shortly after the defendants began to take seriously the prospect of a U.S. competitive threat started by a German company which had been marketing such a product overseas since the late 1970's, although the defendants claim that the technology for successfully heat treating was "unavailable" to them until after HIV had already spread like wild-fire through the blood supply.

The class was certified by the United States District Court for the Northern District of Illinois, presiding over MDL-986, In re Factor VII and IX Concentrate Litigation. *See Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410

(N.D. Ill. 1994). However, it was decertified by the Seventh Circuit Court of Appeal, which accepted the defendants' contention that the claims of the class members were so wildly disparate as to make any sort of cumulation impossible, even on the limited issues subject to the district court's class certification. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867, 116 S.Ct. 189 (1995).

Before the *Wadleigh* class was finally decertified, the defendants began to negotiate a settlement with class counsel, which settlement contemplated a "settlement-only" class in which each class member, even those which had not yet contracted AIDS, would receive an identical payment. When the district court was apprised of this development which was decided by class counsel as a "de facto replica of a settlement class," it encouraged the parties to hurry with their negotiations, before the Third Circuit Court of Appeal, which had before it *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (2d Cir. 1996), announced a decision that would in all probability "bring down the curtain" on their plan. *See* Trans. (6/4/96), at 9, 26. The court encouraged the parties to expedite matters so that their contemplated settlement could, in its words, "slip in under the wire." *Id.*, at 26.

The settlement was struck, and a motion for class certification was made, the day before a new petition asserting the identical claim that was found incapable of supporting class certification in *In re Rhone-Poulenc*, was filed. The named plaintiff and sole class representative was Susan Walker, a woman who admitted that she had no viable claim because the statute of limitations had

passed, and whose only chance of recovery was the settlement class action. $600,000,000 was offered to her and the persons she represented, with each entitled to $100,000 *if* a sufficient number of putative class members "opted-in" to the settlement. The plaintiffs' steering committee in MDL 986 was offered a $40,000,000 Cost and Fee Fund if a sufficient number of putative class members opted-in as well. The court ordained that the steering committee, which was appointed class counsel, would be available free of charge to any hemophiliac who needed advice as to whether to accept the settlement, but if such a hemophiliac wanted independent advice, the costs associated with such would have to be borne by the individual hemophiliac.

The settlement class was tentatively certified, notice was issued, *see* App. 57-76 and a deadline of October 15, 1997 for the filing of claim or exclusion forms was set. Following the deadline, the defendants determined that the 6,000 or so opt-ins was a sufficient number to make the settlement profitable for them, and so finally accepted the settlement. The district court then held two fairness hearings, and ultimately approved the settlement on May 8, 1998. *See* App. 77-94. Not a word was mentioned by either class counsel, the defendants, or the court about the *Georgine* decision, in which Judge Becker had indeed as prognosticated sharply curtailed the availability of "settlement only classes," even though the potential illegality of the class was raised in pleadings filed in court by various class members and their counsel and even though the defendants were, at the same time, appearing as *amicus curiae* before this Court in its review of *Georgine*,

asserting that if this Court affirmed Judge Becker's decision, it would make their settlement class illegal. *See* Brief of Rhone-Poulenc Rorer, Inc., *et al.*, Docket #96-2706, at 3.

This Court issued *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997), on June 25, 1997, while the May 8, 1998 order was on appeal by a few more than 20 class members (all of these persons had "opted-in" because no opt-out would have had standing to contest the class action). Because it was fairly obvious that the Seventh Circuit's decertification of the settlement-only class was a matter of inevitability given *Amchem*, the defendants (without court approval) secured the dismissal of the appeals by allowing each appellant to exit the settlement class and pursue litigation, despite the litigation bar order contained in the May 8 order to which they were subject. *See e.g., Appeal of Dowling & Smith*, No. 97-2410 (7th Cir.).

As to the other class members, the defendants secured repose through a court approved Release which they made a pre-condition to receipt of settlement proceeds. *See* App. 95-109. While it is customary in class actions for class members to submit claim forms which might contain a release paragraph, the Release circulated herein is extraordinary. It constitutes a "stand alone" settlement document, complete with all terms, many of which are difficult to reconcile with the settlement that was the subject of the Notice given to class members.

For example, the Notice did not fairly apprise class members that they were agreeing to extinguish all claims for any injury derived from factor concentrates, such as hepatitis, although its "class definition" included such

persons within the ambit of the settlement class (most probably because few hemophiliacs who had contracted HIV have escaped hepatitis or other diseases transmitted by the concentrates.)[1] Yet the Release compromises claims involving "the HIV virus and other viruses related to plasma factor concentrates and derivatives." *See*, App. 96.

Also, the original settlement expressly states that the claimants would have no liability for any subrogation liens that might be asserted by medical providers. Yet the Release places this obligation squarely upon the shoulders of the Releasor, to the extent that such liens have not previously been resolved by the Fractionators. *Compare* App. 50-51, at P(1), *to* App. 105-06, at ¶ 15.

The original settlement expressly preserves to the claimant the right to pursue third party claims. *See*, App. 68 ("acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators . . . "). Yet the Release requires waiver of all claims against the United States or any other political subdivision. *See*, App. 100-01, at ¶ 5. As to the claims for contribution or indemnity against the Fractionators such third party claims might generate, the Notice states that "if you have filed a lawsuit against some party other than the Fractionators,

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[1] The Notice defines a "claim" solely in a descriptive paragraph referring to pending lawsuits that "claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX." *See* App. 58. Thus, the Notice's reference to settlement of "claims involving contaminated Factor Concentrate" logically extends only to claims involving HIV infection.

acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit." *See*, App. 68. On the other hand, the Release includes a provision requiring the Releasor to indemnify the Fractionators for any third-party claims against them. *See*, App. 99-100, at ¶ 3.

Finally, the Release demands that the Releasor warrant by his or her signature that the execution of that document is **not** the product of the May 8 order, and is voluntarily entered into despite the order:

> Releasors represent and warrant that they understand that it is their decision and their decision alone whether or not to sign this Release. Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement but rather a completely private settlement.

App. 105, at ¶ 14. This provision cannot be reconciled with a class Notice predicated upon the court's preliminary fairness finding announcing a settlement that can only exist due to judicial approval. Nor can it be reconciled with the notion that if Releasors do not sign the Release, they will nonetheless be bound by the May 8 bar order, since the Release states that it is not induced by this injunction.

The instant matter involves those few class members who refuse to sign the Release. They all have lawsuits pending which either predated the settlement entirely, or which were filed prior to the dismissal of appeals from the May 8 order, at a time when it appeared virtually certain that the settlement would not survive *Amchem* and which had to be filed to overcome the statute of limitations.

Cross-motions are the vehicle through which the controversy arises. The defendants asked the court to enjoin these lawsuits. The class members asked for Rule 60 relief from the May 8 order, on the ground that the order was null because the court was without Article III jurisdiction and because it violates due process due to insufficient notice and inadequate representation by Susan Walker and her attorneys, all of whom labored under an impossible conflict of interest. They further argued that the Release constituted a changed circumstance which made continued enforcement of the May 8 order unconscionable. In order to abide by the May 8 order and accept the settlement, they would have to sign a document swearing under oath that their acceptance was not premised upon the fairness finding that produced the May 8 order and that it is not the product of the duress of the anti-suit injunction contained in the May 8 order, neither of which

is true and neither of which condition they would possibly have known at the time they opted-in to what they thought was a class action settlement, approved by a court upon whose findings on which they thought they were entitled to rely.

The district court resolved the motions in the defendants' favor, relying almost exclusively upon an earlier decision by the Seventh Circuit which had dismissed a challenge to this class filed personally by the class members' counsel asserting issues relating to the Cost and Fee Fund and abrogation of their fee contracts. *See* App. 3-4, *citing In re Factor VIII or IX Concentrate Blood Prod. Lit.*, 159 F.3d 1016 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1488 (1999) (hereinafter *"Mull and Mull"*). The district court found that this decision was dispositive of the putative class members rights, although it did concede that the class members' were not bound by that decision. *See* App. 4 n.2.

The Seventh Circuit agreed. It issued a terse ruling affirming the dismissal of the Rule 60 request and the issuance of the anti-suit injunctions, citing *Mull and Mull* as controlling. *See* App. 1-2.

REASONS FOR GRANTING CERTIORARI

I.

Regardless of what was held relative to the attorneys' fees claims in *Mull and Mull*, it has been the constitutionally compelled rule that unnamed class members always have standing, either by Rule 60 motion or by collateral attack, to seek the nullity of a Rule 23 judgment

asserted against them on the ground that the judgment violated due process, because of either lack of notice or inadequate representation. *See, Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, (1985); *Zablocki v. Redhail*, 434 U.S. 374, 380 n.6, 98 S.Ct. 673, 678 n.6 (1978) ("Absent class members may assert their due process rights through collateral attack or otherwise."). *See also, Twigg v. Sears Roebuck and Co*, 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process, and an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process."); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 n.11 (6th Cir. 1997) ("absent class member may later collaterally attack a faulty judgment by challenging adequacy of representation"); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1432-33 (2d Cir. 1993), *cert. denied sub nom., Hartman v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140, 114 S.Ct. 1126 (1994) (recognizing a constitutional obligation to entertain, but rejecting on the merits, a due process collateral attack based upon inadequate representation in a prior settlement).

The lower court decisions are directly contrary to these cases. Citing and relying upon the attorneys' fees challenge in *Mull and Mull*, the courts have refused to even discuss the class members' contention that this class is void for lack of Article III jurisdiction, and that to enforce it against them is contrary to due process given the inadequate representation offered by Susan Walker

and her conflict-ridden counsel.[2] This settlement is exactly the kind of constitutionally questionable practice that this Court targeted in *Amchem*.[3] In fact, in *Mull and*

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[2] Neither the district court in *Walker*, nor the district court or the Seventh Circuit in *Mull and Mull* nor in the instant proceeding, has considered how Susan Walker, a woman who admitted she had no viable claim against the defendants and thus would accept a settlement for *any* amount offered her, could represent class members with viable claims, including class members whose claims had not yet even arisen, such as family members with future death claims, hemophiliacs who had not yet contracted AIDS, or minors. Nor has there been any consideration of how class counsel could adequately represent any class member given the conflicts under which it labored. In order to secure the settlement for its one client, Susan Walker, and the Cost and Fee Fund for itself, it had to convince enough persons to opt-in to the settlement to satisfy the defendants so that they would not exercise their veto power. Since there was no fixed number of permissible opt-outs, every class member had to be encouraged to opt-in because that member could be the one who broke the camel's back.

[3] Despite lengthy litigation over the issue, the Fractionators have never asserted that the settlement could survive an *Amchem* analysis, probably because the record reflects that one was never conducted. At the hearing when class certification was first proposed, the court expressed grave concerns about its appropriateness because "these cases differ so greatly from each other in terms of their strengths and weakness," running the "spectrum from very poor prospects of recovery, to arguably, reasonably good prospects of recovery," that an analysis of the individual facts of each case would be "out of the question." Later, the district court certified the settlement class and preliminarily approved the settlement without discussion of the "usual adequacy of class representatives, findings, and that type of thing for the fairness hearing." Trans. (8/14/96), at 36. Certification of a settlement class resolving disparate claims, without scrupulous compliance with Rule 23, is exactly what *Amchem* rebuked. *See Amchem, supra*, 117 S.Ct. at 1250

Mull, upon which the decision under review is based, the Seventh Circuit commented that the settlement was "downright weird," 159 F.3d at 1018, but refused to consider whether its eccentric features rendered it unworthy of continued enforcement by prospective injunctive relief.

Although it has previously spoken on the issue, apparently there is a need for this Court to revisit the issue of how the constitutional rights of class members can be vindicated. The need is evident not only from the decisions below, which are impossible to square with existing precedent, but also from the recent *Matsushita* litigation. In *Matsushita Elec. Ind. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873 (1996), this Court held that a state court class action settling the claims of class members was entitled to the preclusive effect that would be given it under state law, even if the settlement included claims that could not have been litigated in state court because exclusive jurisdiction over them was vested in federal courts. Accordingly, because Delaware courts would have afforded the class settlement at issue full preclusive effect even as to the federal securities claims included in the compromise, full faith and credit required that federal courts recognize that the federal securities claims were extinguished by the settlement. *See* 516 U.S. at 374, 116 S.Ct. at 878.

(discussing use of a settlement class in the face of "[d]ifferences in state law" that "compound [the] disparities" between the fact "questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions.").

Following remand, the Ninth Circuit addressed the viability of the plaintiffs' contention that preclusive effect could not be given to the settlement because of the alleged conflict of interest that precluded adequate representation. On original hearing, a divided court, composed of Judges Norris and Williams with O'Scannlain dissenting, held that this Court's decision in *Matsushita* left that question open. *See Epstein v. MCA*, 126 F.2d 1235, 1248 (9th Cir. 1997). It further held that the plaintiffs were free to raise the inadequate representation claim in defense to a contention that the settlement barred their federal securities claims.

> Matsushita argues that class members who wish to contest adequacy of representation must intervene during the course of the class action proceedings and do battle with their own representatives in an adversarial contest over the way they are discharging their fiduciary duties. This argument ignores the clear teaching of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), that a class member is not required to do anything during the course of a class-action proceeding.
>
> * * *
>
> *See Shutts*, 472 U.S. at 810, 105 S.Ct. at 2973-74; *Gonzales*, 474 F.2d at 76 ("The [adequate representation safeguard] would be subverted by requiring a class member . . . to monitor the litigation. . . . "). They may rest secure in the knowledge that they can attack the judgment in a subsequent action if their due process rights are in fact violated.
>
> * * *

> In adopting *Gonzales'* reasoning (and rejecting Matsushita's spin on it), we bring our circuit into line with settled law that forecloses Matsushita's intervene-or-be-estopped theory. * * * As Justice Ginsburg further made clear in her separate opinion in *Matsushita*: "[An absent class member] may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings."

126 F.3d at 1242-43, 1244-45.

Rehearing was granted, and a second divided panel, this time composed of Judges O'Scannlain with Williams concurring and Thomas dissenting held that *Matsushita* foreclosed the inadequate representation claims. *See Epstein v. MCA*, 179 F.3d 641 (9th Cir. 1999). Critical to the plurality opinion was the view, held by Judge O'Scannlain and Judge Williams in concurrence, that the inadequate representation issue had already been resolved by this Court in *Matsushita*, which had reviewed the Delaware court's determination that due process had not been violated. According to Judge O'Scannlain:

> While the Court's explicit consideration in *Matsushita* of the due process requirements to bind absent class members admittedly did not include an express statement that the Delaware judgment in question did not violate due process, that conclusion was logically necessary to the Court's holding. * * * The Supreme Court's holding in *Matsushita* that under Delaware law the *Epstein* appellants were "bound, then, by the judgment," *Matsushita*, 516 U.S. at 379, 116 S.Ct. 873, was thus necessarily premised upon the

> constitutional validity of the Delaware judgment.

179 F.3d at 645. Judge O'Scannlain went on to opine as to whether absent class members had the right to raise the inadequate representation issue in a collateral attack upon the preclusive effect of the settlement; however, he could not secure acquiescence to his thoughts on this subject by the other two members of the court. Judge Williams noted in his concurrence that his change of view in the case was premised solely upon his reconsideration of whether this Court's decision in *Matsushita* had left the issue open for determination on remand, and he was now of the opinion that it did not. *See* 179 F.3d at 650-51. Judge Thomas' dissent adopted Judge Norris' opinion on original hearing, to the effect that the Court had previously held that the absent class members were free to raise the due process claim in opposition to the preclusive effect of the settlement and that this Court's decision in *Matsushita* did not foreclose such a contention. *See* 179 F.3d at 652-53.

This Court subsequently denied certiorari. *See Epstein v. Matsushita Elec. Ind.*, ___ U.S. ___, 120 S.Ct. 497 (1999). However, its failure to reconsider the case indicates that Judges O'Scannlain and Williams were correct in their contention that the *Matsushita* decision resolved the due process claim because this Court found no error in the Delaware Court's decision that due process had been satisfied. Three of the Ninth Circuit Judges (Norris, Thomas and Williams) had held that if this Court had not already resolved the due process claim, the MCA absent class members were free to raise it collaterally in response to a demand that the settlement be given preclusive effect.

The history of the *Matsushita* litigation, combined with the short shrift given the issue below, indicates that there is great need for this Court to address the issue of the rights of absent class members. Previously, this Court has unequivocally held that an absent class member has no duty to intervene in a proceeding to assert his or her objection, decisions which were recently relied upon in *Ortiz v. Fibreboard*, ___ U.S. ___, 119 S.Ct. 2295, 2315 (1999), as standing for the "deep-rooted historic tradition that everyone should have his own day in court." *See Richards v. Jefferson Cty.*, 517 U.S. 793, 796, 116 S.Ct. 1761, 1766 (1996) (duty to intervene and participate does not arise except in certain limited instances, such as "class action" suits where the interests of absent class members are in fact adequately represented); *Martin v. Wilks*, 490 U.S. 755, 762-65, 109 S.Ct. 2180, 2184-86 (1991) (failure to intervene did not estop non-parties from suing parties to consent decree that adversely affected their interests). Since unnamed class members, even those who "opt-in," have no standing to appeal a class certification determination absent intervention, *see Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1059 (6th Cir. 1994) (non-named class members lacked standing to appeal a settlement order because they failed to intervene); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993) (intervention by unnamed class member required to appeal class settlement); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert. denied*, 507 U.S. 908, 113 S.Ct. 1251, 122 L.Ed.2d 650 (1993) (unnamed class member must first move to intervene as condition for standing to appeal final order approving class action settlement or imposing judgment), it remains to be explained how a failure to intervene in order to

appeal the approval of a class settlement can forever bar a subsequent contention that the settlement was confected in violation of the due process rights of the unnamed class members. *See Martin*, 490 U.S. at 763, 109 S.Ct. 2180, 2185 ("a party seeking a judgment binding on another cannot obligate that person to intervene" and a judgment is binding on nonparty represented persons only where the representation has been adequate to satisfy due process).

In short, there is good cause for this Court to revisit the issue of the ability of unnamed class members to vindicate their due process rights when they are subsequently made parties to a lawsuit in which the preclusive effect of a class action determination is asserted. This case offers the unique opportunity to address the issue perhaps lacking in *Matsushita*, because here the due process claims were not addressed by the courts below. While the *Walker* court found the settlement fair and reasonable, it never conducted a Rule 23 inquiry (as had been done by the Delaware court in the MCA class) to determine whether the interests of the unnamed class members were being adequately protected. Subsequently, in *Mull and Mull* and the decisions below, the courts have refused to consider the issue on the ground that the *Walker* judgment precludes it. The issue of whether claim preclusion can substitute for due process is thus squarely presented.[4] This Court should seize the opportunity to

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[4] The only impediment which might complicate consideration of the issue is the district court's alternative holding that the Rule 60 request was untimely. *See* App. 8. In so holding, the court failed to distinguish between the two

address the issue, particularly given its obvious relevance to the recent concerns expressed by the Court in *Amchem* and *Ortiz* regarding the serious potential for abuse inherent in "settlement only" class actions.

II.

Another unique opportunity presented by this case is the chance to address a serious question of Article III jurisdiction that was raised in both *Amchem* and *Ortiz*, but which was pretermitted in both decisions. If Article III means anything it should doom any attempt by parties to present to the court a fake petition asserting a claim that they never intend to litigate (here a class action claim that was already held in *In Re Rhone-Poulenc* to be nonviable) purely for the purpose of invoking the jurisdiction of the federal court in order to borrow its enforcement powers to effect a settlement that would purport to bind other, unnamed parties.

Article III jurisdiction does not exist when "immaterial" claims are asserted "solely for the purpose of obtaining jurisdiction." *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998). In such instances, the fraud in the procurement of the judgment deprives the judgment of the normal effect "finality" might bestow. 305 U.S. at 172. *See e.g., Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *Muskrat*

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grounds for Rule 60 relief asserted herein. Rule 60(4), invoked by the class members for their due process and subject matter jurisdiction claims, is not subject to any time limit. *See e.g., Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986).

v. U.S., 219 U.S. 346, 359 (1911); *Cleveland v. Chamberlain*, 66 U.S. 419, 425 (1861). *See also, Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). "[T]he federal courts lack authority to act in friendly or feigned proceedings." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997).

Amchem and *Ortiz* both implicated the Article III concern, but in both cases this Court could not reach the issue because of its finding that the settlement classes were improper under Rule 23, a "logically antecedent" inquiry. *See Ortiz, supra*, 119 S.Ct. at 2307. Here, if it is true that the Rule 23 inquiry is not an issue any longer given the finality of the May 8 order approving the settlement class, then the Article III issue is front and center.

Neither the district court nor the Seventh Circuit in *Mull and Mull* or in the instant proceeding have bothered to explain how a federal district court can have Article III jurisdiction to preside over a proceeding in which the only basis for jurisdiction (diversity of citizenship) is invoked through a petition that the parties admit to be false and fraudulent. In fact, Susan Walker's petition was only filed as an afterthought by the parties, when the district court remarked that they needed some procedural vehicle through which its powers might be invoked. *See* Trans. (8/14/96), at 5.

But, Article III is not merely a procedural nicety that can be satisfied so cavalierly. It does mean something, although it is repeatedly sabotaged by litigants who collude to accomplish objectives that necessitate the power of the federal judiciary for their satisfaction. *Amchem* and *Ortiz* are recent examples. This case is another.

Unlike *Ortiz* and *Amchem*, here the Article III issue is squarely raised for this Court's consideration. A definitive ruling by this Court as to the ability of federal courts to preside over national settlements in which the power of the court is invoked through sham litigation would be of immense benefit to future class members and defendants in the many instances in which the issue is sure to arise in the future.

III.

Given the dispositions below, it would be easy to sweep the rights of the class members confronted with the Release in this case under the rug – after all over 5950 have signed the Release, and as to them the matter is over. The defendants can be counted on to portray the class members that are before this Court as a mere ripple on an otherwise calm sea, whose stillness should not be disturbed by clamor of the "disgruntled."

But then, they do not have to sign the Release. Lost in all the tranquility, and unaddressed by the courts below, is how the class members before this Court can make the Sophie's Choice that is being forced upon them, and from which only this Court can save them. When they opted-in to the settlement, there was absolutely no way that they could have known about the Release that would contain terms to which they never consented, which purports to be a voluntary act to which they do not consent, and which demands that they swear, under oath, that the court's May 8 fairness finding had nothing to do with their participation in this alleged class action and that the May 8 anti-suit bar order has nothing to do with their

signature on the Release. And, as a result of the rulings below, if they do not "voluntarily" sign this document, they will lose not only the settlement benefits that initially induced them to "opt-in" but also their right to pursue litigation claims as well.

In *Kokkonen v. Guardian Life Ins. Co.*, 510 U.S. 375, 114 S.Ct. 1673 (1994), this Court held that a federal court has no continuing jurisdiction to enforce a settlement agreement merely because that agreement leads to the dismissal of a federal suit unless the court retains such jurisdiction in the judgment itself. But, what of the situation where jurisdiction is retained, but one of the parties attempts to use that jurisdiction to enforce a "voluntary" contract that goes beyond the original judgment? And, what, if any, jurisdiction exists to coerce signatures on a document which expressly states that execution of the document is unrelated to the very judgment through which the court purports to have jurisdiction?

These are, admittedly, questions that have never arisen before, and are not likely to be presented again, unless this "class action" is used as a blueprint for how to effect a patently illegal class settlement in the face of *Amchem* and *Ortiz*, and then to use a release to insulate the settlement from future challenge.[5] Nonetheless, for

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[5] This is not an unimaginable circumstance, given that in a class action such as this, there is no one to object, so the collusive settlement could easily sail through the courts until "final" judgment is achieved. All persons not initially wishing to participate will "opt-out". At the fairness hearing, the only persons who have standing to comment are those that "opt-in," and they are not likely to object. Thereafter, any "opt-in"

the persons who do not accept the Release, they should be told why they must "voluntarily" sign a document that requires them to commit perjury in order to receive the settlement benefits they were led to believe they could expect through a "class action" settlement, and why the cost of those benefits is allowed to be more than what was advertised in the Notice.

The All Writs Act, which has been invoked by the courts below to authorize the injunctive relief granted herein, has never been interpreted so broadly as to afford a court the power to coerce acceptance of an agreement that purports to be "voluntary." If the Release is a voluntary instrument, and it is a precondition to the settlement of any class members' claim, then the May 8 order cannot be used to force acceptance of the Release.

Admittedly, this serious issue is not one that would customarily be within the scope of this Court's interest. There are no conflicting decisions in the circuits to resolve, there is no broad sweeping new rule announced, and the interests of only a few litigants are at stake. But, the other interest at stake is the interest of the federal judiciary itself in not being made a party to fraud upon

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wishing to object can simply be allowed to switch to an "opt-out" until finality of judgment is achieved. Dissent is silenced, and all future attempts to challenge the class can be stopped by a Release which simply states that the settlement is not dependent on the class action and is concluded as if it was a purely private voluntary arrangement. Such an arrangement seems more devious than even the most unscrupulous and brazen colluders would attempt to dare, except that this is exactly what occurred below.

the court. Here, the defendants have successfully concluded what can only be described as a "bait and switch," entirely conceived and executed to circumvent this Court's ruling in *Amchem*. Long before this settlement was approved, they knew that its legality under Rule 23 was in serious doubt. Without federal judicial assistance, however, the settlement the defendants envisioned (which contemplated paying all claimants an identical sum and purchasing class counsel's assistance in encouraging opt-ins with the $40,000,000 Cost and Fee Fund)[6] could not have occurred. Thus, the result is a settlement which has its origins in a sham petition filed as a mere afterthought, which was expedited in order to slip in "under the wire" before *Amchem* brought "the curtain down," and which is now being concluded by virtue of a court-approved settlement document that expressly purports to be a voluntary act, which alters the terms of the original class settlement, and which requires a sworn promise that it is not being executed under the coercive effect of a class action judgment or in reliance on the very fairness finding which bore it. These few class members before this Court, who are not willing to compromise principle for the $100,000 waived before them, beg this Court for relief, if only for a remand of this case with instructions to the courts below to address the effect of the Release on the continued viability of the district court's May 8 order.

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[6] The defendants sweetened the deal by offering to allow those attorneys who delivered the most number of opt-ins a greater piece of the Cost and Fee Fund pie. *See* Trans. (9/5/97), at 119.

CONCLUSION

For the foregoing reasons, petitioners pray that certiorari be granted to review the decisions below which enjoin their claims against the respondents, and which deny their request to be released from the May 8 judgment in exchange for their forfeiture of the settlements benefits contained therein.

Respectfully submitted:

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UNPUBLISHED ORDER
NOT TO BE CITED PER CIRCUIT RULE 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 27, 1999
Decided October 7, 1999

Before
Hon. Richard A. Posner, Chief Judge
Hon. William J. Bauer Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

IN RE: FACTOR VII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 99-1798, 99-1822 & 99-2245	)	No. 96 C 5024 John F. Grady, *Judge*.
APPEAL OF: AARON T. TALLAKSON, DAMON CHAPPIE, MARK HELM, et al.	)	

Order

The appellants, several members of the plaintiff class in a class action on behalf of hemophiliacs who consumed blood concentrates infected by the AIDS virus, appeal from the district judge's orders denying their Fed. R. Civ. P. 60(b) motions to set aside the judgment settling the case and enjoining them from bringing collateral suits, attacking or bypassing the judgment, in state court. A materially identical appeal was decided against other

dissatisfied class members in *In re Factor VIII or IX Concentrate Blood Products Litigation*, 159 F.3d 1016 (7th Cir. 1998). For the reasons stated in that decision and in the orders of the district court here appealed, the judgments of the district court are

AFFIRMED.

96-5024.993 March 3, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION SUSAN WALKER, Administratrix of the Estate of Steven Walker, Deceased, Plaintiff, v. BAYER CORPORATION, et al., Defendants.	MDL-986 THIS DOCUMENT RELATES TO: No. 96 C 5024

ORDER DENYING THE RULE 60 MOTIONS OF CERTAIN MEMBERS OF THE SETTLEMENT CLASS

In the case of *In Re: Factor VIII or IX Blood Products Litigation*, 159 F.3d 1016 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit denied the *mandamus* petition of certain attorneys who challenged the class action settlement in this case. The attorneys argued that the settlement was void under the Supreme Court holding in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997) and that it was for various additional reasons beyond the authority of this court to approve. The Court of Appeals rejected most of the arguments and denied the

mandamus petition. Some of these same attorneys have now filed motions under Rule 60 of the Federal Rules of Civil Procedure raising essentially the same arguments on behalf of clients who did not opt out of the settlement.[1] They insist that, not having been parties to the *mandamus* petition, the clients are not bound by the Seventh Circuit decision.[2]

Responses to the Rule 60 motions have been filed by the fractionator defendants and lead counsel for the plaintiff class. They contend that the Seventh Circuit decision in the *mandamus* proceeding is the law of the case, applicable to these movants, and that the movants' arguments are without merit in any event.

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[1] The attorneys who sought *mandamus* were Mull & Mull, represented by Robert Arceneaux. They have filed one of the two Rule 60 motions. The other motion was filed by attorney Mark Jay Bern on behalf of several class members who assert that their claims arise under the laws of New York. Mr. Bern was not one of the petitioners in the *mandamus* proceeding.

The final movant is Jane Doe, representing by attorney Roy G. Spece. She joins in the motion and adopts the arguments made by the plaintiffs represented by Mr. Arceneaux.

[2] This is reminiscent of the argument these same attorneys made as to why they were not "bound" by the order of May 8, 1997 when they sought to collect fees that were barred by that order: they were not "parties" to the case, but only attorneys for parties. See Order Concerning Certain Claims for Attorneys Fees, February 18, 1998, p. 8. That argument was unsuccessful then, but this time they are correct.

DISCUSSION

The Question of Prior Adjudication

The Seventh Circuit will determine for itself whether its decision in the *mandamus* proceeding establishes the law of this case on the points raised by the movants. But what the Seventh Circuit held in the *mandamus* case is binding on this court in any event. Movants' assumption that they are writing on a clean slate ignores the doctrine of *stare decisis*.

We are not persuaded by any of the arguments in the present motions to depart from anything we said in the Order Concerning Certain Claims for Attorneys Fees dated February 18, 1998.[3] Therefore, we will be guided not only by the Seventh Circuit decision in the *mandamus* proceeding, but also by the order of February 18, 1998. In that order, we addressed most of the arguments advanced by the present movants and will not repeat that discussion here.

The Merits

The Mull & Mull-Arceneaux movants make three arguments. The Mark Jay Bern movants adopt those arguments and add a fourth which is based on the fact that their claims allegedly arise under the laws of New York. A brief discussion will dispose of each of the four arguments.

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[3] This is the order that prompted the *mandamus* petition.

I.

The "New Offer" Argument

Movants argue that the terms of the release submitted by the fractionators make clear that the settlement terms were being abrogated and that a "new offer" was being made to each of the class members. Because the movants were free to reject the offer, they have elected to do so. We dealt with this argument in our February 18, 1998 order concerning attorneys fees. We reject the argument again for the reasons explained in that order. (Order of February 18, 1998, pp. 4-7, 14-17).

II.

The Voidness Argument

Movants argue that the order of May 8, 1997 approving the class settlement is void under the *Amchem* case. We rejected this argument in our order of February 18, 1998, (*id.* at 9-11), as did the Seventh Circuit in its *mandamus* ruling. We adhere to our own previous decision, and, more importantly, follow the decision of the Seventh Circuit.

III.

The Argument That There Was No Case or Controversy

The movants argue, simply on the basis that this was a "settlement only" class, that the "case or controversy" requirement of Article III of the Constitution was not met. They concede in their reply brief (p. 21) that the Seventh Circuit held this court did have Article III jurisdiction to enter the order of May 8, 1997, but argue that " . . . this

holding is impossible to reconcile with prevailing Supreme Court jurisprudence." This is an argument movants will have an opportunity to make to the Seventh Circuit. As far as we are concerned, the *Walker* case, in which we certified the settlement only class, can only be viewed as part of a larger litigation in which the parties were very much opposed to each other until the *Walker* settlement was reached. Movants would ignore this reality and regard the *Walker* settlement as coming out of the blue, with no connection to the long controversy which proceeded it and which accounted for the very existence of this multidistrict litigation.

IV.

The New York Revival Statute

The movants represented by Attorney Bern argue that the New York revival statute is a "changed circumstance" which entitles them to set aside the judgment order of May 8, 1997, approving the settlement. Plaintiffs and defendants point out that the possibility of this New York legislation was known in 1996, long before this court approved the settlement and long before the opt-out date. Passage of the legislation was not a certainty, of course, but it was certainly foreseeable. It is not in our view a circumstance that would justify setting aside the settlement for these claimants and allowing them to proceed with individual actions. Defendants have cited a number of cases for the proposition that a change in the statute of

limitations is not a proper basis for reopening a judgment, and we agree with these cases.[4]

The Question of Timeliness

Rule 60 motions must be asserted within a reasonable time after judgment is entered. Movants argue that void judgments may be attacked at any time. We believe the May 8, 1997 judgment is not void and that movants are limited by the reasonable time requirement. Considering the lapse of time itself, and the substantial changes of position made by the numerous participants in the settlement in the meantime, we believe movants' delay in presenting these motions is inexcusable.

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[4] Defendants do not concede that the revival statute is applicable to most of the Bern movants in any event. They argue that many of these movants have claims with no connection to New York and have filed their cases in New York "in the misguided hope that they would be able to avail themselves of the revival statute." Defendants' brief, p. 14 n. 11. This court has no basis for an opinion as to whether all of the Bern movants would in fact be entitled to the two-year window, but if any of them are not, it would be unfortunate indeed if we were to grant their motion for relief from the judgment and then see them impaled on the statute of limitations when they sought to proceed with individual claims.

CONCLUSION

For these reasons, the Rule 60 motions of class members represented by Mull & Mull and Robert Arceneaux, by Marc Jay Bern and by Roy G. Spece are denied.

DATE: March 3, 1999

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FACTOR CONCENTRATE LITIGATION
SETTLEMENT AGREEMENT

August 13, 1996

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This Factor Concentrate Litigation Settlement Agreement ("this Agreement") is made this 13th day of August, 1996 by and between the following (all of which are hereinafter collectively referred to as the "Parties"): ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHÔNE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of

Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer shall together hereinafter be referred to as "the Fractionators"], and Susan Walker ("Plaintiff"), individually and as representative of the Settlement Class (as defined in Section C), acting by and through the undersigned Lead Class Counsel (it being understood that Class Counsel shall be those persons whom the Court appoints as Class Counsel, and that Class Counsel shall include, subject to Court approval, David S. Shrager and Dianne M. Nast who are hereinafter designated in this Agreement as Lead Class Counsel).

WHEREAS, one or more operating companies of each of the Fractionators processed and distributed in the United States plasma factor concentrates and derivatives used for the treatment of hemophilia ("Factor Concentrates");

WHEREAS, the Fractionators are defendants in numerous state and federal lawsuits (the "Lawsuits") involving claims of persons with hemophilia who allegedly are HIV infected and allegedly have other injuries resulting from the use of Factor Concentrates, and other claims related to the use of Factor Concentrates by persons with hemophilia;

WHEREAS, Class Counsel have conducted discovery and investigations into the facts of the Lawsuits, have studied the legal principles applicable to the claims in the Lawsuits, as well as the legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators

in the amount and on the terms hereinafter set forth (the "Settlement") is fair, reasonable, and adequate, and is in the best overall interest of the Settlement Class;

WHEREAS, having considered the decision of the United States Court of Appeals for the Seventh Circuit in *in re Rhône-Poulenc*, the Parties nevertheless believe that the Settlement Class described hereunder can properly be certified under Rule 23(e), and it is the Parties' desire that the Court certify the Settlement Class;

WHEREAS, the Plaintiff avers, but the Fractionators deny, that the Fractionators are liable under various doctrines and theories of liability, and the Fractionators further deny that they have negligently or recklessly committed any wrongful or tortious acts or omissions, or breached any duties of any kind whatsoever, either separately or jointly, or are liable in any other way to any member of the Settlement Class;

WHEREAS, the Fractionators further aver, but Plaintiff denies, that the Fractionators have at all times acted lawfully and with full and proper concern for the health, safety and welfare of the public; and

WHEREAS, while asserting (a) that the claims that have been or could be made by members of the Settlement Class have no merit, (b) that the Fractionators have meritorious defenses to such claims, (c) that the Fractionators have affirmative defenses that bar such claims, and (d) that the Fractionators should be dismissed from the Lawsuits, all of which contentions Plaintiff denies, the Fractionators nevertheless have agreed to enter into this Agreement as a compromise of disputed liabilities and to bring the litigation substantially to an end;

NOW, THEREFORE, in consideration of the covenants and agreements herein, and INTENDING TO BE LEGALLY BOUND, the Parties hereby agree as follows:

A. OVERVIEW OF AGREEMENT

1. The purpose of this Section A is merely to provide a general and simplified overview of this Agreement and to place in context the operative provisions of this Agreement that are set forth in Sections B through W of this Agreement. This Section A shall not define the rights and obligations of the Parties. To the extent that there is any conflict or inconsistency between Section A and the provisions of Sections B through W, the latter shall control.

2. This Agreement contemplates the following sequence of events:

(a) The parties will seek conditional certification of the Settlement Class, preliminary Court approval of the Settlement and authorization to disseminate notice.

(b) Assuming that the Court conditionally certifies the Settlement Class, grants its preliminary approval of the Settlement and authorizes the dissemination of notice, notice will be disseminated and persons receiving notice will have an opportunity to submit claims, to opt out or to object.

(c) Upon consideration of the Opt-Out Forms, each of the Fractionators will decide, in its sole and unfettered discretion, whether it wishes to proceed with the Settlement.

(d) Assuming that all the Fractionators decide to proceed with the Settlement, the Court will conduct a hearing to determine whether to grant final certification of the Settlement Class and final approval of the Settlement, unless, as explained in subparagraph (h) below, the Parties ask the Court to grant conditional approval of the Settlement. If the Court grants final approval of the Settlement, the Court may award attorneys' fees and costs under such terms and conditions as it deems fair and just, subject to limitations specified in Section L.

(e) Assuming that the Court grants final approval of the Settlement, all persons who have perfected their claims will be paid, and, as awarded by the Court, attorneys' fees and costs will be paid out of the Cost and Fee Fund.

(f) Class members who have opted out of the Settlement Class will retain whatever rights or claims they might otherwise have against the Fractionators (to the extent permitted by law), Class members who have neither submitted Claim Forms nor opted out will be barred from pursuing claims against the Fractionators.

(g) If, upon consideration of the Opt-Out Forms, one or more of the Fractionators (but less than all 4) decide to withdraw from the Settlement, Plaintiff shall have the right to withdraw from this Agreement. Alternatively, the Parties may go forward upon the terms outlined in Section O, or may renegotiate the terms and conditions of settlement.

(h) While this Settlement is pending, the Parties will continue the cooperative effort that they have already begun to resolve issues relating to reimbursement and subrogation claims

that might possibly be asserted and issues relating to Class members' continuing eligibility for third-party Medicaid or Medicare payments. If these issues cannot be resolved to the Parties' mutual satisfaction, this Settlement will either not go forward at all, or the Parties may ask the Court to grant approval of the Settlement conditioned on the subrogation and eligibility problems being resolved at a later date.

B. SETTLEMENT AMOUNT; PAYMENT

1. (a) The Fractionators shall pay a total of $100,000 for each approved Claim, *provided, however,* that payments for certain Claims may be reduced because of prior settlements or judgments in accordance with paragraph C(4).

(b) The Parties will request that the Court enter an Order providing: (i) that because it is the function of Class Counsel to provide information about this Settlement to members of the Settlement Class, any person who seeks the advice of an attorney other than Class Counsel on the question whether to participate in this Settlement shall be personally responsible for compensating said attorney for such advice, in accordance with paragraph L(4); and (ii) that all other requests for attorneys' fees and cost reimbursement shall be paid, subject to Court approval, out of the Cost and Fee Fund described in Section L, below.

(c) The Fractionators shall make or be responsible for payments for each Claim in the following shares: Alpha 15%, Amour 20%, Baxter 20% and Bayer 45%. The Parties have not yet determined whether payments shall be made

directly by the Fractionators or out of one or more funds or trusts created by the Fractionators, or in some other manner. No Fractionator shall be responsible to pay the share of any other Fractionator, except as specifically provided herein.

2. Each HIV infected person who is a member of the Settlement Class under paragraphs C(2)(a), C(2)(b) or C(2)(c) (*i.e.*, who is infected or was infected with HIV, whether directly through use of Factor Concentrate, or indirectly, through birth or through sexual contact with someone who was directly infected), shall have a Direct Claim. Each person who is not HIV infected but who is a member of the Settlement Class under paragraph C(2)(d) (for example, a non-infected spouse, a non-infected dependent child, or a non-infected wrongful death beneficiary) shall have a Derivative Claim. Each Member of the Settlement Class under paragraphs C(2)(e) and C(2)(f) shall have a Representative Claim. A Representative Claim may be asserted on behalf of a person who otherwise would have a Direct Claim or on behalf of a person who otherwise would have a Derivative Claim.

3. (a) Every Direct Claim, and every Representative Claim asserted in substitution of a Direct Claim, shall result in a separate payment of $100,000, or a lesser amount under paragraph C(4), provided that all other requirements for payment under this Agreement have been met.

(b) Derivative Claims, and Representative Claims asserted in substitution of Derivative Claims, shall not result in a separate payment of $100,000, or a lesser amount under paragraph C(4), unless the person asserting such a Claim is the only person who has any kind of claim,

whether Direct, Derivative or Representative, with respect to the HIV infection of a particular person who is or could be a member of the Settlement Class under paragraphs C(2)(a), C(2)(b) or C(2)(c) below. Rather, the entire group of persons who have Direct, Derivative or Representative Claims based on the HIV infection of the same individual shall be eligible for a single payment of $100,000, or a lesser amount under paragraph C(4).

(c) The HIV infection of a person who is or could be a member of the Settlement Class under paragraphs C(2)(a), C(2)(b) or C(2)(c) shall result in only one payment of $100,000 or a lesser amount under paragraph C(4). The payment of $100,000, or a lesser amount under paragraph C(4), on the basis of the HIV infection of a person who is or could be a member of the Settlement Class under paragraphs C(2)(a), C(2)(b) or C(2)(c) shall extinguish the rights under this Settlement Agreement of that person as well as the rights under this Settlement Agreement of every person with a Derivative or Representative Claim that is based on the HIV infection of that Class member, and shall also extinguish all causes of action based on that same HIV infection. Such payment, however, shall not extinguish the rights of a person with a Direct, Derivative or Representative Claim or cause of action based on the HIV infection of a different person who is a Class Member under paragraphs (c(2)(a), C(2)(b) or C(2)(c).

4. As used herein, "Claimant" shall mean a person (a) who is a member of the Settlement Class, and (b) who is the only person with a Direct, Derivative or Representative Claim that is eligible for payment as a result of the

HIV infection of a particular individual who is or could have been a Class Member under paragraphs C(2)(a), C(2)(b) or C(2)(c). Examples include, but are not limited to: (i) a living HIV infected person with hemophilia who is a member of the Settlement Class, who has not passed on his HIV infection to anyone else and who has no spouse, parents or children, and (ii) a non-HIV infected, childless widow of an HIV infected person with hemophilia who is a member of the Settlement Class and who also is the executrix or administratrix of her deceased husband's estate.

5. A "Claimant Group" is a group of two or more persons (a) off of whom are members of the Settlement Class, and (b) all of whose claims are related to the same HIV infected person who is a member of the Settlement Class under paragraphs C(2)(a), C(2)(b) or C(2)(c). Examples include, but are not limited to: (i) and HIV infected person with hemophilia and his uninfected wife and children, so long as all of them are members of the Settlement Class (ii) an executor or administrator of the estate of a deceased HIV infected person with hemophilia and that person's personal representative and statutory wrongful death beneficiaries, so long as all of them are members of the Settlement Class, and (iii) an HIV infected minor person with hemophilia and his parents or guardians, so long as all of them are members of the Settlement Class.

6. Each Claimant and each Claimant Group shall be eligible for a single payment of $100,000, or a lesser amount under paragraph C(4). The following are examples of how payments will be made to Claimants and Claimant Groups:

(a) If an HIV infected person with hemophilia who is a member of the Settlement Class has not infected any other person, the person with hemophilia, together with any other person or persons who may have a Derivative or Representative Claim as a result of that HIV infection, shall be eligible (upon submission of an approved Claim Form) for a single total payment of $100,000, or a lesser amount under paragraph C(4).

(b) If an HIV infected person with hemophilia who is a member of the Settlement Class has transmitted the infection to another person who is a member of the Settlement Class, the other person, because he or she has a Direct Claim (as does the person who passed on the infection to him or her), shall be eligible (upon submission of an approved Claim Form) for payment of $100,000, or a lesser amount in accordance with paragraph C(4) in addition to the $100,000 claim of the individual who passed on the infection to him or her. If other people have Derivative or Representative Claims because of the HIV infection of such a person, they shall, together with the infected person, constitute a Claimant Group, and the entire group shall be eligible for a single payment of $100,000, or a lesser amount under paragraph C(4).

(c) A person shall be deemed "HIV infected" if it is shown, through appropriate documentation, that he/she meets or has met one or more of the following conditions:

(i) he/she has tested or currently tests HIV antibody positive on an FDA licensed

commercial ELISA HIV antibody test confirmed by a Western Blot HIV antibody test;

(ii) he/she has been diagnosed with AIDS; and/or

(iii) If the claim relates to a decedent, the death certificate, medical records or other satisfactory evidence, as described in the Claim Form, indicate that at the time of his or her death, he or she had AIDS or an "opportunistic infection" or another condition which would cause that person to meet the current definition of AIDS established by the U.S. Centers for Disease Control, or that he or she (or his or her stored serum sample) tested HIV antibody positive on an FDA licensed commercial ELISA HIV antibody test confirmed by a Western Blot HIV antibody test.

7. The parties shall hereafter agree to procedures governing payments under this Settlement. No payments shall be made to a Claimant or Claimant Group until (i) all the conditions set forth in Sections O and P have been satisfied, (ii) a final judgment has been entered in accordance with Section J, (iii) the time for appeals from the final judgment has expired or the judgment has been affirmed by the highest Court in which appellate review may be sought, and (iv) the Claimant or Claimant Group has submitted all the required information and documentation, including a release, and, when necessary, as may be the case for certain minors or incompetents, approval is obtained from a Court in the state of residence of the Claimant or member of the Claimant Group.

C. CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

1. Lead Class Counsel shall file a motion for conditional certification of a Settlement Class, for the purposes of settlement only, in the United States District Court for the Northern District of Illinois, under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In seeking the various Court orders contemplated by this Agreement, the Parties will request the Court to exercise all the power, to the fullest extent of its jurisdiction, that it enjoys both as a judge of the United States District Court for the Northern District of Illinois and as a United States District Court designated by the Judicial Panel on Multi-District Litigation to supervise MDL-986.

2. The Settlement Class shall consist of all living persons (whether or not they submit Claim Forms or Opt-Out Forms, as described in Sections E and F) who, as of the date of this Agreement, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons

who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

3. Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant

Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial Court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

4. The Settlement Class shall include any person who otherwise is a Claimant or member of a Claimant Group where that Claimant or one or more members of the relevant Claimant Group settled with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000, *provided, however,* that the amount that such Claimant or Claimant Group shall receive under this paragraph (assuming that he or they otherwise fulfill(s) all the requirements that other Claimants or members of Claimant Groups must fulfill in order to receive payment) shall be the difference between $100,000 and the total amount that he or she, or any other member of the Claimant Group, previously received, and *provided further* that the Claimant or Claimant Group shall be required to show use by the relevant HIV infected person with hemophilia

of Factor Concentrate processed or distributed during the period from 1978 through 1985 by at least one of the Fractionator(s) with which the Claimant or other member of the Claimant Group did not previously settle. The payment shall be made exclusively by the Fractionator(s) with which the Claimant or other member of the Claimant Group did not previously settle, in the ratio of its/their proportionate shares as provided by paragraph B(1)(c). For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000 to be paid exclusively by Baxter and Alpha, assuming proof of use of Factor Concentrate processed or distributed by either Baxter or Alpha during the period from 1978 through 1985. In this example, Alpha would pay $23,571.43 ($^{15}/_{35}$ of $55,000) and Baxter would pay $31,428.57 ($^{20}/_{35}$ of $55,000). By way of further example, a Claimant Group, one or more of whose members previously settled with Baxter for a total of $15,000, would be entitled to receive another $85,000, to be paid $15,937.50 by Alpha ($^{15}/_{80}$ of $85,000), $21,250.00 by Armour ($^{20}/_{80}$ of $85,000) and $47,812.50 by Bayer ($^{45}/_{80}$ of $85,000), assuming proof of use of Factor Concentrate processed or distributed by Alpha, Armour or Bayer.

5. The inclusion of any person in the proposed Settlement Class does not constitute an admission by the Fractionators that such person has a legally cognizable claim nor an admission by such person as to the value or amount of the claim, nor an admission that certification of a litigation class would be appropriate.

6. Certification of the Settlement Class shall not constitute an admission by the Fractionators that any

particular person within the Class was injured as a result of the use of Factor Concentrates.

7. Certification of the Settlement Class provided for herein shall not be:

(a) construed by anyone for any purpose whatsoever as, or deemed to be, evidence of a presumption, concession or an admission by the Parties of the truth of any fact alleged or the validity of any claims, or of the deficiency of any defense that has or could have been asserted in the Lawsuits, or of any liability, fault or wrongdoing on the part of the Fractionators;

(b) offered or received as evidence of a presumption, concession or an admission of any liability, fault, or wrongdoing, or lack thereof;

(c) construed by anyone for any purpose whatsoever as an admission, concession or assertion that $100,000 represents the amount which could be or would have been recovered after trial or constitutes a reasonable settlement in any context other than the Settlement contemplated by this Agreement; or

(d) cited or used by Plaintiff or any of Class Counsel against any of the Fractionators in support of any pending or subsequent motion for certification of any litigation class in any state or federal Factor Concentrate case.

D. PRELIMINARY APPROVAL OF SETTLEMENT: AUTHORIZATION AND DISSEMINATION OF NOTICE

1. The Parties shall submit this Agreement to the United States District Court for the Northern District of

Illinois for the Court's consideration, and shall request an Order or Orders of the Court including, but not limited to, the following terms:

(a) Conditionally certifying a Settlement Class as described in Section C;

(b) Granting preliminary approval of the Settlement;

(c) Scheduling a Final Approval Hearing to determine the fairness, reasonableness, and adequacy of this Agreement and the Settlement, to determine whether the Agreement and the Settlement should be approved by the Court, and to consider applications for attorneys fees and reimbursement of cost disbursements. The Parties will request that the Court schedule the Final Approval Hearing to be held within 120 days of the Court's entry of the latter of the Orders (i) granting Plaintiff's motion for certification of the Settlement Class and (ii) authorizing the dissemination of Notice;

(d) Directing that Notice, in the form of Exhibits A and B be given, within the terms of the order authorizing the Notice, to the members of the Settlement Class.

(e) Providing that the Notice disseminated in accordance with the Plan of Notice (Exhibit C), shall constitute fair, reasonable and adequate notice of the proposed final certification of the Settlement Class, of the proposed final approval of the Settlement, and the proposed award of attorneys' fees and reimbursement of costs and of the Final Approval Hearing, to all persons entitled to receive such Notice, and requiring that proof of such notice be filed at or prior to the Final Approval Hearing;

(f) Directing that a post office box(es) shall be rented for receipt of completed Claim Forms and Opt-Out Forms, as provided in the Notice, and providing that only the Settlement Administrator or Special Master or other judicial officer (as described in Section H), subject to strict confidentiality, shall have access to the box(es); and

(g) Appointing a guardian *ad litem* to represent and protect the interests of minor members of the Class.

2. Implementation of the Order directing the dissemination of Notice to members of the Settlement Class shall be the responsibility of Lead Class Counsel. Notice shall be given in accordance with the Plan of Notice (Exhibit C), subject to Court approval.

3. All costs of the Notice (including any reasonable expenses and costs of gathering, compiling and computerizing class membership lists; printing; mailing; and postage) shall be paid out of the Cost and Fee Fund described in Section L, subject to Court approval.

E. SUBMISSION OF CLAIM FORMS

1. An eligible person or group of persons who desires to be included in the Settlement Class must submit an agreed-upon and Court-approved Claim Form to the Settlement Administrator or Special Master or other judicial officer (as described in Section H) by a date to be established by the Court, and shall submit with the Claim Forms the various documents listed on the Claim Form, *provided, however*, that any person who personally, or by a lawyer authorized to act on his or her behalf, timely

submits a Claim form with at least his or her name and address shall have an additional period of time, to be approved by the Court, to supplement the Claim Form with the remaining information and the required documents.

2. The deadline for submission of Claim Forms under this section shall be the same date as the deadline for submission of Opt-Out Forms under Section F.

3. If the person submitting a Claim Form is represented by a lawyer, the Claim Form shall identify the lawyer. If the person submitting the Claim Form is or was a plaintiff in a past or pending Lawsuit, the Claim Form shall contain all reasonably available information about the Lawsuit and its resolution. If the person submitting the Claim Form has previously made one or more claims against one or more of the Fractionators, the Claim Form shall contain information about all previous claims and their resolution.

4. A Claimant (as defined in Section B) shall not be entitled to payment except upon submission of a Claim Form signed by the Claimant in which he/she represents that he/she knows of no other persons who, together with him/her, could constitute a Claimant Group.

5. No member of a Claimant Group (as defined in Section B) shall be entitled to payment except upon either (a) submission of a Claim Form signed by all the members of the Claimant Group in which they represent that they know of no other persons who are members of the Claimant Group, or (b) submission of a Claim Form signed by less than all the members of the Claimant Group and entry of an Order by the United States District

Court for the Northern District of Illinois, upon such further procedures as the Court may require, expressly barring any claims by the members of the Claimant Group who have not signed the Claim Form. As provided in paragraph F(2), however, if one or more members of a Claimant Group submit a Claim Form but another member of the Claimant Group submits an Opt-Out Form, no one in that Claimant Group shall be eligible to participate in the Settlement.

6. A Claimant or a member of a Claimant Group who is a minor, or is legally incompetent, or the estate of a deceased Claimant or member of a Claimant Group, shall not be entitled to payment except upon submission of a Claim Form signed by a person or persons authorized by law to act on his/her behalf, or on behalf of the estate, that is supported by documentation substantiating the legal authority of the person signing the Claim Form.

7. If a Claimant or member of a Claimant Group, pursuant to paragraph E(1), makes any material representation, whether knowingly or unknowingly, that is later determined to be incorrect, and if payment would not have been made to the Claimant or member of the Claimant Group but for said representation, the person making such representation shall repay to the Fractionators all money received under this Settlement.

F. SUBMISSION OF OPT-OUT FORMS

1. All persons who desire to be excluded from the Settlement Class (hereafter "Opt-Outs") must submit by a date to be established by the Court an Opt-Out form or other written notification of a desire to be excluded. The

deadline for submission of Opt-Out Forms under this section shall be the same as the deadline for submission of Claim Forms under Section E. No Opt-Out will be entitled to any payment from the Fractionators as part of this Settlement. With regard to any eligible person who desires not to participate in the Class but who is a minor or who is not otherwise legally competent to contract, an Opt-Out Form must be signed by a parent or legal guardian of such person on behalf of such person. If an Opt-Out is represented by a lawyer in connection with this litigation or this Settlement, both the Opt-Out and the lawyer shall sign the Opt-Out Form.

2. If any one member of a Claimant Group opts out of the Settlement Class, all persons who are properly included in that Claimant Group shall be deemed to have opted out and no member of the Claimant Group shall be eligible to receive any payment under this Agreement. If one of two or more related but separate persons with Direct Claims opt out, however, the other person(s) with Direct Claims shall not be deemed to have opted out (unless such other persons have separately opted out). Examples include, but are not limited to, the following: (i) if a married person with hemophilia opts out, his wife or children who are not HIV infected will be deemed to have opted out as well because they are all members of a single Claimant Group, and they will not be entitled to participate in the Settlement; (ii) if, on the other hand, a person with hemophilia opts out of the Settlement, but his wife or children are themselves also HIV infected, the wife or children, because they each have a separate Direct Claim, will not be deemed to have opted out of the Settlement unless they separately opt out on their own behalf.

3. If the Court Administrator, Special Master or other judicial officer (as described in Section H) reports to Lead Class Counsel and the Fractionators that two or more members of a Claimant Group have submitted conflicting forms, *e.g.*, one has submitted a Claim Form and one has opted out, the Parties shall make mutually agreeable efforts to encourage the members of the Claimant Group to agree and to participate in the Settlement. If appropriate, the Parties shall agree to procedures by which such persons are given an additional period of time to submit a revised Claim Form.

G. BAR ON CLAIMS BY PERSONS WHO NEITHER OPT-OUT NOR SUBMIT CLAIMS

All members of the Settlement Class who neither request exclusion pursuant to Section F nor file a claim pursuant to Section E shall be forever barred by final judgment from asserting any claims against any of the Fractionators, the terms of which judgment shall have the same effect as if such persons had executed appropriate joint tortfeasor releases or documents of equivalent effect as described in Section J.

H. SETTLEMENT ADMINISTRATOR OR SPECIAL MASTER OR OTHER JUDICIAL OFFICER

1. Within 15 days of a Court order conditionally certifying the Settlement Class, the Parties shall inform the Court whether they prefer to have an agreed-upon Settlement Administrator perform the tasks described in this Section H or prefer to ask the Court to appoint a

Special Master or other judicial officer to perform such tasks.

2. If the Parties ask the Court to appoint a Special Master or other judicial officer, and the Court agrees to do so, the Special Master or other judicial officer will perform such tasks.

3. If the Parties prefer to retain a Settlement Administrator to perform such tasks, they shall agree on a person or organization to serve as Settlement Administrator, and shall request the Court to authorize such retention.

4. Members of the Settlement Class (and their individual counsel, if any) shall be instructed to send only to the Settlement Administrator or Special Master or other judicial officer (and to no one else) all Claim Forms and Opt-Out forms, except that a plaintiff who is presently individually represented by any of Class Counsel may, of course, send such forms to his or her own counsel for forwarding to the Settlement Administrator or Special Master or other judicial officer. Except as provided in paragraph H(5), the Settlement Administrator or Special Master or other judicial officer shall not send any Claim Forms or Opt-Out Forms to the Parties, any of Class Counsel (including Lead Class Counsel) or counsel for the Fractionators.

5. As Claim Forms and Opt-Out Forms are received from persons who are not plaintiffs in pending lawsuits, the Settlement Administrator or Special Master or other judicial officer shall send to the Court, to Lead Class Counsel and to counsel for the Fractionators (a) weekly reports that shall state how many such persons have

submitted Claim Forms (whether complete or incomplete) and their states of residence, and how many such persons have submitted Opt-Out Forms, and (b) copies of the Opt-Out Forms from which names, street addresses and telephone numbers have been redacted, but from which no other information, including cities, states, zip codes and telephone area codes, has been redacted. Upon the request of the Parties, the Settlement Administrator or Special Master or other judicial officer shall verify, to the extent feasible, that the Opt-Out Forms were submitted by persons who, but for opting-out, would indeed have been members of the Settlement Class. Within 5 days after the deadline for submission of Claim Forms and Opt-Out forms, the Settlement Administrator or Special Master or other judicial officer shall submit to the Court and to counsel for the Parties a final report. The final report shall state how many such persons have submitted Claim Forms and how many such persons have submitted Opt-Out Forms. At that time, the Settlement Administrator or Special Master or other judicial officer shall also send to the Court, Lead Class counsel and Counsel for the Fractionators any redacted Opt-Out Forms received from such persons but not previously sent. Neither the interim report nor the final report shall contain the names, addresses or telephone numbers of persons who have submitted Claim Forms or Opt-Out forms unless they are plaintiffs in pending lawsuits. To the extent feasible, the weekly and final reports shall inform Lead Class Counsel and the Fractionators if two or more members of a Claimant Group have submitted inconsistent forms, e.g., one person has submitted a Claim form and one has opted out.

6. As Claim Forms and Opt-Out Forms are received from persons who are plaintiffs in pending lawsuits, the Settlement Administrator or Special Master or other judicial officer shall forward them promptly in non-redacted form to Lead Class Counsel and to counsel for the Fractionators.

7. If, upon review of the redacted Opt-Out Forms *i.e.*, those that are received from persons who are not plaintiffs in pending lawsuits, it shall appear to Lead Class counsel or the Fractionators that certain persons have opted out without fully appreciating the consequences of their decision, the Settlement Administrator or Special Master or other judicial officer, or a lawyer chosen jointly by the Parties, shall, at the request of any of the Fractionators or of Lead Class counsel, call or write such Opt-Outs, according to guidelines to be agreed upon by the Parties, and, if requested by an Opt-Out, shall send him or her a list of the lawyers serving on the MDL-986 Plaintiffs' Steering Committee. In the case of an Opt-Out Form indicating that the person submitting the form is represented by a lawyer, such communication, if any, shall be with the lawyer.

8. If (a) upon consideration of the Opt-Out forms, each of the Fractionators decides, in its sole and unfettered discretion to proceed with the settlement pursuant to paragraph O(2)(a), (b) all other conditions of Section O are met or waived, and (c) the Court grants final certification of the Settlement Class and final approval to the Settlement, the Settlement Administrator or Special Master or other judicial officer shall then send copies of all Claim Forms to Lead Class Counsel and counsel for the Fractionators. Counsel shall hold in confidence the names

of all persons who have submitted Claim Forms, except as expressly provided in other provisions of this Agreement.

9. The Settlement Administrator or Special Master or other judicial officer shall maintain a list of (a) all counsel and all public or private agencies, institutions and organizations to which Notice was sent for further dissemination to potential members of the Settlement Class, as described in the Plan of Notice (Exhibit C), and (b) all persons to whom Notice has been individually sent, including persons who are presently plaintiffs in lawsuits, and (c) all persons to whom counsel and public or private agencies, institutions and organizations that assisted in the dissemination of Notice report that they sent Notice. If the Settlement is finalized, and any lawsuit is thereafter filed against any of the Fractionators, the Settlement Administrator or Special Master or other judicial officer, upon the request of any of the Fractionators, shall state, upon reasonable payment received from the Fractionator(s), whether the plaintiff(s) in said lawsuit submitted an Opt-Out Form and, if not, whether the plaintiff(s) appear(s) on any of the lists of persons to whom Notice was sent. If requested, the Settlement Administrator or Special Master or other judicial officer shall also so state in an affidavit or other official document.

10. If the Settlement is not finalized, the Settlement Administrator or Special Master or other judicial officer shall lodge under seal with the Clerk of the Court all copies of all Claim Forms and Opt-Out Forms, as well as the list of persons to whom Notice was sent. Except upon

order of the Court, said forms and lists shall not be available to the Parties, to counsel or to anyone else.

I. GUARDIAN AD LITEM

The Parties will request the Court to appoint a guardian *ad litem* to represent and protect the interests of those members of the Settlement Class who are minors. At least ten (10) days before the Final Approval Hearing, the guardian *ad litem* shall submit a report on the fairness of this Settlement Agreement to minor members of the Settlement Class, collectively. Fees and expenses incurred by the guardian *ad litem* for this purpose and approved by the Court shall be paid out of the Cost and Fee Fund described in Section L. The Parties recognize that in many instances, depending on the laws of the various states, a settlement involving a minor may also have to be separately approved by a Court in the minor's state of residence, but it shall not be the responsibility of the guardian *ad litem* appointed hereunder to obtain such separate approval. The Parties will request that in the order appointing the guardian *ad litem*, the Court provide that upon final approval of the Settlement, the guardian *ad litem* shall be discharged from any further responsibility or obligation whatsoever.

J. FINAL APPROVAL AND JUDGMENT

1. If the Court grants final certification of the Settlement Class and final approval of the Settlement after notice and hearing, a final judgment of the Court pursuant to Federal Rule of Civil Procedure 54(b) shall be

entered by the Clerk of the United States District Court for the Northern District of Illinois:

(a) approving the Settlement set forth in this Agreement as fair, reasonable, and adequate in all respects;

(b) approving the Notice and Notice Plan;

(c) forever barring every Class member (other than persons who have, or are deemed to have, opted out) from prosecuting any claim or lawsuit against any of the Fractionators arising out of all injury, disease or harm of any kind, that the HIV infected person allegedly suffered as a result of use of Factor Concentrate processed or distributed during the period from 1978 through 1985, including, but not limited to, HIV, AIDS, and any and all forms of hepatitis.

(d) providing that every Class member (other than persons who have, or are deemed to have, opted out) shall be deemed, on behalf of him/herself and his/her heirs, successors and assignees, to have individually executed an appropriate general or joint tortfeasor release or document of equivalent effect to release the Fractionators as described in paragraph J(e)(iv) herein;

(e) requiring that no Claimant or Claimant Group who/which has submitted a Claim Form shall receive payment except upon (i) providing proof, under conditions of strict confidentiality, that he/she is a member of the Settlement Class, (ii) providing authorizations, also under strict confidentiality, for such medical records (not including psychological or psychiatric records) as may be requested by or on behalf of any Fractionator or any insurance carrier for any of

the Fractionators for purposes of internal allocation of financial responsibility for payments, *provided, however,* that it shall not be a condition of payment that such records themselves have at that time been obtained by the Fractionators or their insurance carriers, and *provided further* that no medical records so obtained shall be used for any other purpose except where necessary to validate a claim, (iii) in the case of a minor, providing evidence of authority or approval to submit a Claim Form on behalf of the minor, and (iv) executing a joint tortfeasor release or other similar document, the effect of which will be to protect the Fractionators, to the maximum extent possible, from any liability for contribution or indemnification claims that might otherwise be asserted by persons or entities, other than the Fractionators, that have been sued or may in the future be sued by Claimants or members of Claimant Groups. The effect of such releases or other documents shall be to reduce any judgment obtained by Claimants or members of Claimant Groups against any other person or entity by the amount, percentage or share of such judgment attributable to the Fractionators as may be necessary to bar, discharge, and release under applicable law any claims from contribution or indemnity against the Fractionators arising from or related to the claims. In the event that a member of the Settlement Class (other than an Opt-Out) obtains a judgment against one or more other persons or entities and any of those persons or entities obtains a judgment over, in whole or in part, against one or more of the Fractionators for contribution or indemnity arising from the claims, then the member of the Settlement Class will be required

to reduce or remit any judgment or portion thereof obtained from those non-settling defendants by the amount of the judgment over against the Fractionators;

(f) reserving jurisdiction over all matters relating to the administration of this Agreement, including distribution of the Settlement funds; and

(g) retaining jurisdiction to protect and effectuate this judgment.

2. The Parties recognize that in paragraph J(1), they may not have foreseen every issue that should properly be addressed in the Court's final judgment. No party is precluded from requesting that the final judgment entered by the Court include additional provisions that are consistent with this Agreement; no other party shall oppose the inclusion of such additional provisions, so long as they are consistent with this Agreement.

3. The judgment under paragraph J(1) is not intended to affect any substantive rights or causes of action that any member of the Settlement Class may have against any defendant other than the Fractionators, including any claim of joint liability, *provided, however,* that the judgment described in paragraph J(1) shall operate and have the effects described therein.

K. DETERMINATION OF ELIGIBILITY FOR PAYMENT

1. Counsel for the Parties shall agree upon procedures which, if the Court grants final certification of the Settlement Class and final approval of the Settlement,

will result in prompt payment of all approved claims and rejections of claims that are not eligible for payment.

2. Except as a result of the procedures described in paragraphs K(3-4), no payment shall be made with respect to claims which Lead Class Counsel and the Fractionators agree to recommend for disallowance.

3. All claims as to which Lead Class Counsel and the Fractionators disagree shall be submitted to a Dispute Resolution Process, the details of which the Parties shall hereafter agree upon, subject to Court approval. Through the Dispute Resolution Process, all claims shall be recommended for allowance or disallowance.

4. According to procedures that the Parties shall suggest to the Court, subject to Court approval, each person whose claim is recommended for disallowance either by agreement of Lead Class Counsel and the Fractionators or through the Dispute Resolution Process shall have the right to object (personally or through counsel) to said recommendation, and each Fractionator shall have the right to object to any claim that is recommended for allowance through the Dispute Resolution Process. The Court may in its discretion appoint a Special Master to hear such objections. An Order of the Court allowing or disallowing any claim shall be deemed a final order under F.R.C.P. 54(b).

5. Subject to Court approval, a claim shall be disallowed if the Claimant fails to provide necessary documentation in support of said claim, after a reasonable opportunity to do so, and the person making such a claim shall be barred from further suits against the Fractionators, *provided, however,* that any person whose claim is

finally disallowed not because of a failure to provide documentation but because he or she does not fall within the Settlement Class shall thereafter be deemed not to be a member of the Settlement Class.

6. All persons deemed under paragraphs K (2, 3 and 5) not to be members of the Settlement Class (as well as all persons who otherwise are not members of the Settlement Class) shall have the right to pursue individual lawsuits against the Fractionators. Nothing in this Agreement shall be construed to limit in any way the claims available to plaintiffs or the defenses available to the Fractionators in such lawsuits, *provided, however,* that the otherwise applicable statute of limitations is deemed to be tolled for such persons as provided in Section T.

7. Neither Lead Class Counsel, the Fractionators nor the Fractionators' counsel shall have any liability for or to any member of the Settlement Class with respect to recommendations to the court to allow or disallow claims, and neither the Fractionators nor their counsel shall have any liability for or to any person with respect to decisions concerning amounts charged under the supervision of the Court, as attorneys' fees or administrative or other charges, except as set forth in Section L, below.

L. COST AND FEE FUND

1. Within 5 business days after signing this Agreement, each fractionator shall deposit into an interest bearing escrow account in a major U.S. commercial bank, designated by Lead Class Counsel and agreed to by the Fractionators (which agreement shall not be unreasonably

withheld), its proportionate share of a $40 million Cost and Fee Fund, *i.e.*, Alpha $6,000,000, Armour $8,000,000, Baxter $8,000,000 and Bayer $18,000,000. Interest earned on the Cost and Fee Fund shall become part of the Cost and Fee Fund. In the event one or more of the Fractionators subsequently withdraws from this Agreement, but the Settlement goes forward as to at least one Fractionator, the proportionate share(s) of principal and interest in the Cost and Fee Fund shall be promptly refunded to the withdrawing Fractionator(s), after deduction of its/their proportionate share of the cost of Notice to Class members and any administrative costs incurred to the date of withdrawal. After all Court-ordered or Court-approved payments from the Cost and Fee Fund have been made, the principal or interest remaining in the Cost and Fee Fund, if any, shall be refunded to the participating Fractionator(s) in its/their proportionate share.

2. The Cost and Fee Fund shall be used to pay attorneys' fees and costs, as provided in paragraph L(4), as well as the costs of Notice provided for in Section D of this Agreement, the costs and fees of the Guardian *Ad Litem* provided for in Section I, the costs and fees of the Settlement Administrator or Special Master or other judicial officer, and the costs of processing the Claim Forms, including costs associated with the Dispute Resolution Process described in Section K. Approval of payments from the Cost and Fee Fund for Notice, for the Guardian *Ad Litem*, for processing Claims Forms and for the Dispute Resolution Process shall be the responsibility of Lead Class Counsel, subject to Court approval. The parties shall request that the Court enter an Order providing that no attorneys' fees shall be payable by any class

member other than those fees approved by the Court to be payable from the Cost and Fee Fund except as provided in paragraph L(4).

3. Such attorneys' fees are reimbursement of cost disbursements as the Court may award to Class Counsel, to members of the MDL-986 Plaintiffs' Steering Committee, and to any other attorney who represents one or more members of the Settlement Class shall be paid from the Cost and Fee Fund, except as provided in paragraph L(4).

4. Because it is the function of Class Counsel to provide information to Class members about this Settlement, any Claimant or Claimant Group who seeks the advice of an attorney other than Class Counsel on the question whether to participate in this Settlement shall be personally responsible for paying that attorney's reasonable charges, if any, for such advice. Any such charges shall be on the basis of reasonable hourly rates for actual time expended on behalf of that client, and shall be subject to review by the Court. No attorney shall be entitled to any payment from the Cost and Fee Fund for advice that he or she has given a client on the question whether to participate in the Settlement.

5. In establishing the Cost and Fee Fund, the Fractionators are not conceding that aggregate fees and costs of $40,000,000 (or any other amount) should be awarded, and the Fractionators retain the right to object to applications for fees and reimbursement of costs. Under no circumstances, however, shall the Fractionators have any obligation whatsoever to pay any costs and fees other

than their obligation to deposit $40,000,000 to establish the Cost and Fee Fund.

6. Class counsel, members of MDL-986 Plaintiffs' Steering Committee, and individual attorneys representing Settlement Class members shall petition the Court for awards of attorneys' fees and costs from the Cost and Fee Fund, which petitions shall be filed on a date to be established by the Court.

M. RELEASE AND COVENANT NOT TO SUE

No Claimant or member of a Claimant Group shall be entitled to receive any payment under this Agreement until he/she provides to each Fractionator participating in the Settlement, on behalf of him/herself and his/her heirs, successors, subrogees and assigns, an individually executed appropriate joint tortfeasor release and covenant not to sue that includes the Fractionator and all of its present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors. The release and covenant not to sue shall be for all claims arising out of all injury, disease or harm of any kind that the HIV infected person allegedly suffered as a result of use of Factor Concentrate processed or distributed during the period from 1978 through 1985, including, but not limited to, HIV, AIDS, any and all forms of hepatitis. A description of the effect of such general or joint tortfeasor release shall be incorporated into the Notice.

N. CONTRIBUTION AND INDEMNIFICATION

The Parties intend that the Fractionators obtain in this Agreement total and final peace, satisfaction and protection from any liability arising from any and all claims of the members of the Settlement Class (except those who opt-out), whether or not heretofore asserted, and from any and all claims for joint tortfeasor liability, contribution or indemnity asserted by any person arising from the claims. The Parties further intend to exercise their best efforts to obviate the necessity and expense to the Fractionators of appearing in and defending any action commenced by any member of the Settlement Class (except Opt-Outs) asserting claims against any other person or entity arising from the claims.

O. CONDITIONS: TERMINATION

1. This Settlement is expressly conditioned on the resolution to the Parties' mutual satisfaction of the Subrogration and Eligibility Issues described in Section P.

2. This Settlement is also expressly conditioned on both of the following conditions being met:

(a) Subject to the provisions of paragraph O(5) below, upon consideration of the Opt-Out forms, each of the Fractionators, in its sole and unfettered discretion, decides to proceed with the Settlement. No Fractionator shall incur any liability to any person or entity, whether or not a party to this Agreement, by reason of the Fractionator exercising its right to deem the number of Opt-Outs excessive or its right to withdraw from the Settlement.

(b) Within 30 days after the Court's preliminary approval of the Settlement, the relevant liability insurance carriers for the Fractionators, as determined by each of the Fractionators, agree that the execution of this Agreement and its implementation by each of the Fractionators, respectively, would not contravene any insurance policy provisions and/or other agreements between the Fractionators and their respective insurers governing the entering into settlements by insureds. It shall not be a condition of this Settlement Agreement, however, that the Fractionators' liability carriers agree that they owe coverage for the Claims or for the Settlement.

3. Each of the Fractionators shall have 15 days after its receipt of the Settlement Administrator's final report and the Opt-Out forms that were submitted by the deadline to give notice of intent not to participate in the Settlement based on the failure of the condition in paragraph O(2)(b). Each of the Fractionators shall have 30 days after its receipt of the Settlement Administrator's final report and the Opt-Out forms that were submitted by the deadline to give notice of intent not to participate in the Settlement based on the failure of the condition in paragraph O(2)(a). Notice shall be given in writing to David Shrager and Dianne Nast by facsimile and by hand-delivery or overnight carrier.

4. Each of the Fractionators reserves the right in its sole discretion to waive either of the terms and conditions of paragraph O(2).

5. If one, two or three Fractionators give(s) written notice that it will not participate in the Settlement

because of the failure of one of the conditions of paragraphs O (1 or 2), but one or more of the Fractionators gives no such notice (either because there has been no failure of such conditions as to it, or because the company has elected to waive the condition), then Plaintiff shall have the option: (1) to terminate this Agreement; (2) to renegotiate the terms of Settlement with the remaining Fractionators; or (3) to proceed with a settlement with the non-withdrawing Fractionator(s) based upon that Fractionators's proportionate share, as defined in paragraph B(1)(c), of the Settlement amounts. In the event (2) or (3) is chosen, any Claimant or Claimant Group who/which has previously submitted a Claim Form shall have the right to become an Opt-Out, and following this second opt-out period, each of the remaining Fractionators shall have the opportunity to evaluate the new Opt-Outs and then, in its sole discretion, to proceed with or to withdraw from the Settlement. The procedures to be employed in the event that the Settlement goes forward with fewer then all four Fractionators shall be established by further agreement of the Parties.

6. This Settlement will terminate if this Agreement and Settlement is disapproved, in part or in whole, by the United States District Court for the Northern District of Illinois or by any appellate Court; if the Settlement Class is not certified; if a final judgment on the terms set forth in Section J is not entered; if that judgment has not been affirmed by the highest appellate Court to which an appeal is taken; if this Agreement is terminated by reason of failure of any of the conditions specified in Section O; or if this Agreement and Settlement otherwise is not fully

consummated and effected. If the Settlement terminates for any of these reasons or pursuant to Section P:

(a) Except as otherwise provided in this Agreement, this Agreement shall have no further force and effect and it and all negotiations and proceedings connected therewith shall be without prejudice to the rights of the Fractionators and the members of the Settlement Class;

(b) The Settlement Class will be decertified without prejudice to the rights of any person to seek certification of a litigation class in any Court, *subject*, however, to the provisions of Section S; and

(c) No member of the Settlement Class shall have any right to damages or payment as a result of the failure to consummate the Settlement.

P. REIMBURSEMENT: SUBROGATION: ELIGIBILITY

1. This Settlement shall be conditioned on the resolution to the Parties' mutual satisfaction of all potential reimbursement, subrogation, and direct claims (hereafter referred to collectively as "Subrogation Claims") that might otherwise be asserted against Claimants, Claimant Groups, the Fractionators, and/or their respective counsel. This Settlement shall also be conditioned on the resolution of issues that might effect the eligibility of some or all Claimants or members of Claimant Groups to receive or continue to receive third-party payments or benefits from public or private sector sources, including, without

limitation, Social Security, Medicare, and Medicaid ("Eligibility Issues").

2. To the extent the Parties deem it to be appropriate, they may seek one or more Court orders relating to Subrogration Claims and/or Eligibility Issues. The Parties may also elect to seek an order in which the Court grants approval of the Settlement conditioned on the satisfactory resolution of potential Subrogation Claims and Eligibility Issues. In such event, no payments shall be made to Claimants or Claimant Groups, and no attorneys' fees shall be paid out of the Cost and Fee Fund, until the potential Subrogation Claims and Eligibility Issues have been resolved to the mutual satisfaction of the Parties, and the Court has entered a final judgment in accordance with Section J.

Q. OTHER ACTIONS

1. The Parties shall not oppose the entry of one or more orders by the Court, in aid of its jurisdiction over the proposed Settlement and any conditionally certified Settlement Class, whereby the Court:

(a) Temporarily stays and suspends, pending further order, any and all class certification or class notice proceedings in any and all federal and state civil actions to the extent that any classes proposed or certified in such actions purport to include persons and claims encompassed by this Settlement Agreement; and

(b) Temporarily enjoins the commencement of trial in any federal or state Court, during the period from the date of this Agreement to the deadline for opting out of the Settlement

Class, of any lawsuit brought against the Fractionators by any Settlement Class member who has not opted-out, relating to an injury allegedly caused by the use of Factor Concentrate.

R. CONFIDENTIALITY

If the Settlement Administrator or Special Master or other judicial officer, pursuant to Section H, provides copies of Claim Forms to Lead Class Counsel and the Fractionators, Lead Class Counsel and the Fractionators shall keep in strictest confidence any information about the identify of Claimants and Claimant Groups. The Parties shall request that the Court maintain under seal all such information lodged with the Court, and that the Court impose such other conditions as it may deem necessary adequately to ensure the confidentiality of members of the Settlement Class. The Fractionators shall be permitted to provide copies of Claim Forms (and, subject to paragraph J(1)(e), medical records and other documentation) to their insurance carriers, provided that said carriers agree to keep information about the identity of Claimants and Claimant Groups in strictest confidence at all times.

S. USE OF THIS AGREEMENT

1. This Agreement and the Settlement provided for herein, whether or not consummated, shall not be:

(a) construed by anyone for any purpose whatsoever as, or deemed to be, evidence of a presumption, concession or an admission by the Parties of the truth of any fact alleged or the validity of any claims, or of the deficiency of

any defense that has or could have been asserted in the Lawsuits, or of any liability, fault or wrongdoing on the part of the Fractionators;

(b) offered or received as evidence of a presumption, concession or an admission of any liability, fault, or wrongdoing, or lack thereof;

(c) construed by anyone for any purpose whatsoever as an admission, concession or assertion that $100,000 represents the amount which could be or would have been recovered after trial or constitutes a reasonable settlement in any context other than the Settlement contemplated by this Agreement; or

(d) cited or used by Plaintiff or any of Class Counsel against any of the Fractionators in support of any pending or subsequent motion for certification of any litigation class in any state or federal Factor Concentrate case.

T. TOLLING OF STATUTE OF LIMITATIONS

1. If not already expired as of April 19, 1996, the otherwise applicable statute of limitations shall be deemed to have been tolled as to each member of the Settlement Class from April 19, 1996 to the following:

(a) in the case of an Opt-Out, the date on which an Opt-Out Form is postmarked;

(b) in the case of a person who submits a Claim Form that is disallowed pursuant to Section K, 15 days after the date of the final order disallowing the claim as provided in paragraph K(4);

(c) as to all other persons, the deadline for submission of Opt-Out Forms and Claim Forms,

unless the Court does not grant preliminary or final approval of the settlement, in which event, the tolling shall be to the thirtieth day after the Court order denying preliminary or final approval of the Settlement.

U. BINDING EFFECT

1. The parties deem this Agreement to be fair and reasonable, taking into account all relevant factors of the litigation, and that this Agreement is the result of good faith and arms-length negotiations.

2. All covenants, terms, conditions and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the respective predecessors and successors, and past and present assigns, heirs, executors, executrixes, administrators, administratrices, legal representatives, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), partnerships and partners, and all of their officers, directors, agents, employees and attorneys, both past and present, of each of the Parties hereto. It is understood that the terms of this Agreement are contractual and not a mere recital.

3. This Agreement, with the attached Exhibits, sets forth the entire understanding of the Parties. Any previous discussions, agreements, or understandings between or among the Parties regarding the subject matter herein are hereby merged into and superseded by this Agreement.

4. The Parties acknowledge that there is no adequate remedy at law for breach of this Agreement and that this Agreement is specifically enforceable.

5. All of the Exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

6. Because this Agreement has been jointly prepared by the Parties, it shall not be construed against any of the Parties on the ground that said party prepared it.

V. MODIFICATION AND EXECUTION

1. This Agreement may be executed in counterparts, all of which shall constitute a single, entire agreement.

2. Change or modification of this Agreement shall be valid only if contained in a writing executed by Lead Class Counsel and duly authorized representatives of the Fractionators (which, if the Fractionators so desire, may include their counsel). Waiver of any condition or provision shall be valid only if contained in a writing executed on behalf of the waiving party.

3. This Agreement shall become effective and binding (subject to all terms and conditions herein) upon the Parties and their counsel when it has been executed by the undersigned representatives of the Parties.

W. IMPLEMENTATION OF AGREEMENT

The Parties agree to cooperate in good faith, to use their best efforts, and to take all steps reasonably necessary to implement and effectuate this Agreement and the Settlement provided for herein.

IN WITNESS WHEREOF, each of the Parties executes this Agreement through its duly authorized representatives.

By: /s/ David S. Shrager
Lead Class Counsel

By: /s/ Richard P. Collier
Armour Pharmaceutical Company, Rorer Group Inc., and Rhone-Poulenc Rorer Inc.

By: /s/ Illegible
Bayer Corporation
Bayer A.G.

By: /s/ Dianne M. Nast
Dianne M. Nast
Lead Class Counsel

By: /s/ Illegible
Baxter Healthcare Corporation and Baxter International Inc.

By: /s/ H. Edward Matweed
Alpha Therapeutic Corporation
the Green Cross Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	:	MDL-986 93-C-7452
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	:	THIS DOCUMENT RELATES TO:
	:	NO. 96-C-5024

IMPORTANT LEGAL NOTICE

TO: ALL PERSONS WITH HEMOPHILIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH HIV AND THEIR ESTATES.

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of

the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit pending in federal or state court, or *even if you have not filed a lawsuit.* This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by persons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators."

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor

concentrates. The Fractionators have vigorously defended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plaintiffs. Judge Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3,1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds of depositions, including depositions of the Fractionators' employees, and former employees; conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of

the Fractionators; and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admitting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlement, which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent

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residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor

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Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b) (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own

Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class; (e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility, To simplify matters, the basic guideline for eligibility is that each HIV infected person is generally

eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through birth, or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are not separately eligible to receive $100,000, unless they themselves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $100,000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000. However, if the spouse or child is not HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for $100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long as the deceased person met the definition of an HIV infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2, regardless of whether you already have a lawsuit pending in federal or state court, or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not available to people who choose to continue their lawsuits after the present Notice. *These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.*

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $100,000 (in other words, these individuals can receive the difference, if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concentrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming

proof of use of Factor Concentrate processed or distributed by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before **October 15, 1996** to the address indicated. **All information you supply will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way.** It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing,

preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will *not* have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or

may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors). For example, if you have filed a lawsuit against some party other than the Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form." The "Exclusion Form" must be completed and postmarked on or before **October 15, 1996** if you do *not* desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that

might possibly be asserted – in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid-and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. *Your Right to Participate in the Settlement.*

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. ***Your Confidential Claim Form must be postmarked on or before October 15, 1996.***

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final, in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected person. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate lawsuits against the Fractionators on such claims.

B. ***Your Right To "Opt Out" of the Settlement.***

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds. You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. It is part of the "Confidential Claim Form and Exclusion Form" package on p. 5.) Print and sign your name, stating that you want to be excluded from the Settlement, and return the Exclusion postmarked on or before **October 15, 1996.**

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits,

and damages potentially recoverable in an individual case, and the risks of losing the lawsuit; (2) your desire to pursue or not pursue individual litigation against the Fractionators, and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit, depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) *MUST* sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, *even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.*

C. *Your Right to Support or Oppose the Settlement*

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. ***Failure to File the Confidential Claim and Exclusion Form:***

If you are a member of the Settlement Class described in this Notice, and you "do nothing" – in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class – you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose, to file papers supporting or objecting to the Settlement, and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed

Settlement. If you approve of the Settlement, you do not need to attend the hearing and do not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before **October 15, 1996.** You must send copies of your statement to each of the following: (1) Clerk of Court of the United States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Shrager, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the $100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such advice. All other payments will be made from the Cost and Fee Fund

established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs – both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class – will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection there. If you object to any fee request, you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before **October 15, 1996.**

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of these costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal

business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING PLAINTIFFS' COUNSEL

David S. Shrager, Esquire
Lead Class Counsel
SHRAGER, MCDAID, LOFTUS,
FLUM & SPIVEY
Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 568-7495 (Fax)

or

Dianne M. Nast, Esquire
Lead Class Counsel
RODA & NAST, P.C.
Suite 301
36 East King Street
Lancaster, Pennsylvania 17602
(717) 397-3669 (Fax)

You may call 1-800-836-9376, if you have questions. If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996 By:

/s/_____
Clerk of the Court
United States District Court
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	No. 93 C 7452
	)	THIS DOCUMENT RELATES TO ALL CASES
SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased,	)	
Plaintiffs,	)	No. 96 C 5024
v.	)	
BAYER CORPORATION, et al.,	)	
Defendants.	)	

FINAL ORDER AND JUDGMENT RELATING TO SETTLEMENT

This cause having come before the court for consideration of a final Settlement Agreement and for entry of a Final Order and Judgment, and after full briefing and hearings pursuant to notice where proponents and objectors were heard, and after consideration of the entire record in these consolidated proceedings, it is HEREBY ORDERED as follows:

1. The court has subject matter jurisdiction over this action, and all matters that relate to the settlement.

2. The court has personal jurisdiction over the representative plaintiff, Susan Walker; over the settlement

class members; and over the fractionator defendants (Alpha, Armour, Baxter and Bayer).

3. By order entered on August 14, 1996, this court certified a Settlement class defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any court of the United States, and who are or were:

> (a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);
>
> (b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates);

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute;

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d); and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-

Fractionators), as a result of which a payment or payments totaling $100,000.00 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct claim that has not previously been settled for $100,000.00 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional, certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

4. By order entered on August 14, 1996, this court preliminarily approved the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996, and authorized dissemination of Notice of the Settlement Agreement to the Settlement Class Members.

5. The court finds that, pursuant to a Plan of Notice approved by this court, notice of the proposed Settlement Agreement was timely mailed to the Settlement Class Members, published as ordered in three (3) issues of *USA Today*, posted on the Internet, and provided to PR Newswire for informational releases to radio, television and print media in the United States.

6. The court finds that the notice given to the Settlement Class Members, which was approved by this court, fully and accurately informed the Settlement Class Members of all relevant and material elements of the proposed Settlement Agreement and afforded them an adequate time to decide whether to opt out of the settlement.

7. The court finds that the notice given to the Settlement Class Members constituted the best notice practicable under the circumstances, that the notice constituted valid, due and sufficient notice to all Settlement Class Members, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure.

8. On November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement. The court has considered the objections of persons opposed to the settlement and finds nothing in the objections to justify rejection of the settlement. The objections include:

> (a) the $100,000.00 settlement payment per claimant group is inadequate for the loss suffered;
>
> (b) insurance companies will receive the settlement proceeds or the recipients will be rendered ineligible for government assistance;
>
> (c) infection by Factor Concentrate used in the treatment of a disease called Von Willebrand Disease should qualify for inclusion in the settlement;
>
> (d) each family member should be able to assert his or her own independent claim, rather than being part of a "claimant group" of the infected person;
>
> (e) persons who have litigated and lost prior cases should not be barred from the settlement;
>
> (f) the settlement should be coupled with or made contingent upon passage by Congress of the "Ricky Ray Hemophilia Relief Act"; and
>
> (g) certain persons outside the United States who are neither citizens nor permanent residents and who wished to be included in the settlement should be included.

These objections are further discussed in section 10(E) *infra*.

9. In April 1997, the court received letters from Charles R. Kozak and Thomas W. Mull, two attorneys who represent substantial numbers of class members, asserting that plaintiffs' Steering Committee had not, prior to recommending the settlement, taken adequate account of certain liability theories Messrs. Kozak and Mull believe are substantially more likely to result in recoveries against the defendants than are the theories favored by the Steering Committee. The allegation by Messrs. Kozak and Mull was that, by ignoring the more viable liability theories, the Steering Committee failed in its obligation to obtain the maximum settlement value for the class. obviously, this contention went to the fairness of the proposed settlement, and, after a further exchange of correspondence with Messrs. Kozak and Mull and Mr. David S. Shrager, lead counsel for the class, the court determined that a further fairness hearing was required. That hearing was held on May 6, 1997, pursuant to notice. Mr. Kozak, Mr. Shrager, various members of the Steering Committee, counsel for the defendants, various other attorneys representing class members, and various members of the class appeared and expressed their views. At the conclusion of the hearing, the court was left with no doubt that plaintiffs' Steering Committee was fully aware of the liability theories referred to by Messrs. Kozak and Mull and had fully considered them in determining whether to recommend the settlement. It became clear that, contrary to their assertions, Messrs. Kozak and Mull had no "new information" that was relevant to the fairness of the proposed settlement. In fact, they stated that they were not opposing the settlement but instead were only urging the court to permit late opt-outs on the basis

that the class had only recently been advised of the "new information" they had supplied. For a number of reasons the court explained at the conclusion of the session, this suggestion was rejected.

10. The court has considered the settlement guided by the factors set forth in *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). *See also Donovan v. The State of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985). These include the following factors:

(A) 'The Strength of Plaintiffs' Case on Merits

Most class members are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.) These challenges have largely accounted for the fact that, of the 13 cases tried prior to preliminary approval of the settlement, 12 resulted in defense judgments. In one of those cases, a Jury verdict for the plaintiff was set aside and that decision was affirmed on appeal. *Jones v. Miles Lab, Inc.*, 705 F.Supp. 561 (N.D. Ga. 1987), *aff'd.* 887 F.2d. 1576 (11th Cir. 1989). Two of the 13 cases were reversed on appeal (one is currently subject to retrial). In one of them, plaintiffs had prevailed at trial, *Christopher v. Cutter Lab*, 53 F.3d 1184 (11th Cir. 1995), and in the other case, defendants had prevailed. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995).

After preliminary approval of the settlement, two additional cases have been tried to verdict. In the first,

JKB v. Armour Pharmaceutical Co., No. 49D01 9312-CT-1236 (Marion Superior Court, Indiana), a $2 million verdict was returned in favor of plaintiffs and against a single defendant. There was no issue as to product identification. The plaintiff's decedent was a minor and therefore there were no. arguable statute of limitations issues. Indiana has a strict products liability statute, Ind. Code § 33-1-1.5-1. The jury returned a general verdict, without differentiating between negligence or strict liability. The judgment is subject to appeal.

In the second case, *Howray and Brown v. Alpha Therapeutic and Armour Corp.* in the District Court for Harris County, Case No. 94-049929-A, a verdict was returned in favor of both defendants, Alpha and Armour, and against two infected plaintiffs, after four weeks of trial.

The results of the trials to date favor approval of the settlement because the settlement is a guaranteed sum certain for claimants who have elected to participate.

(B) Stage of Proceedings and Amount of Discovery Completed

This MDL litigation consists of over 200 federal law suits which have been consolidated for pretrial discovery purposes by the Judicial Panel on Multidistrict Litigation. Over the past three years, the parties have vigorously pursued discovery on the "core subjects" delineated in Pretrial Order No. 2, at ¶ 10, and thereafter modified by subsequent rulings. Those core subjects include: the use of, source and identification of blood and blood derivatives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding

plaintiffs' HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation. The Settlement Agreement was signed as that core discovery was being concluded.

The plaintiffs' Document Depository contains over 1.5 million pages of documents which have been reviewed and coded by plaintiffs' attorneys. The depository also contains over 850 deposition and trial transcripts which have been analyzed and digested by plaintiffs' counsel. In addition, the plaintiffs' Steering Committee has prepared for and taken or defended over 170 depositions. Records have been inspected in the United States and in Europe. Dozens of court hearings and pretrial conferences have been held and there have been numerous rulings on contested issues. The docket is over 70 single-spaced pages, one indicator of the extent of this controversy. It also reveals that almost 100 discovery motions have been adjudicated. It is abundantly clear that the proceedings are sufficiently advanced to allow the parties to fairly evaluate the settlement.

(C) The Complexity, Length, and Expense of Continued Litigation

This factor is to some extent addressed in (B) above. There are hundreds of filed lawsuits in state and federal courts which will be resolved through this settlement. Over 6,000 claims have been submitted to the Claims Administrator. If the filed lawsuits (putting aside the

claims which have not yet become lawsuits) were each to be tried individually, it would be at an enormous cost to the state and federal judiciary and to all parties. This factor favors approval of the settlement.

(D) The Absence of Collusion and the Opinion of Competent Counsel

The court is fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval.

(E) The Degree of Opposition to the Settlement

There has been very limited opposition to the settlement. This court has seriously considered and weighed each objection and has determined, after careful review, that the objections do not require rejection of the settlement.

At the time of the November 25, 1996, fairness hearing, 52 persons had criticized or objected to the settlement. Most of the objections were in the form of letters, as opposed to formal court filings. These can be grouped into seven categories:

(1) The first group considers $100,000.00 to be inadequate for the loss suffered. In truth, this court would find it difficult to determine that

any particular amount is adequate to reimburse a spouse for the loss of a loved one, a child for the loss of a parent, or a parent for the loss of a child. But in our legal system, a monetary amount is frequently assigned to such claims for purposes of settlement. The court has considered many factors, including the results of the trials to date, defenses which might result in grants of summary judgment or defense verdicts, statutes of limitation, product identification problems, blood shield statutes, learned intermediary and other defenses. The court also notes that over 90 percent of potential class members have elected to participate in the settlement. While the court appreciates the difficultly in assigning a value to claims such as those asserted here, and understands that a $100,000.00 payment is modest for the injuries suffered by the class members, it has determined, under all the circumstances and considering all the relevant factors, that objections based upon the amount of the monetary payment are not a basis on which to disapprove the settlement.

(2) The second cluster of objections concerns subrogation and medical liens. As stated in the class notice, the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted – in which part or all of the $100,000.00 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid – and issues relating to class members' continuing eligibility for government programs such as Medicare or Medicaid payments. As stated in the notice, if these issues were not satisfactorily

resolved, this settlement would not go forward. Since satisfaction of subrogation and medical liens is a condition precedent to the settlement becoming final, the parties have worked for many months to accomplish that end. These issues have been resolved to the satisfaction of the parties and the court finds that the resolution of these issues is fair and reasonable. Therefore, these objections are moot.

(3) The third cluster of objections relate to Von Willebrand disease. The signatory parties to the Settlement Agreement take the position that persons infected with Von Willebrand disease are not class members and that the settlement was not intended to apply to such persons. This question of whether the Von Willebrand claimants are class members will be resolved in the claims' resolution procedure established pursuant to the Settlement Agreement and need not interfere with or delay approval of the settlement.

(4) The fourth set of objections relates to the concept of a "Claimant Group" pursuant to which claims are to be submitted on behalf of an entire Claimant Group (including spouses and children). It is the HIV infection of an eligible class member which results in the settlement payment. That settlement payment was offered in connection with the claim of each infected person, including his or her Claimant Group. The Claimant Group could either reject or accept the settlement. The court believes that a settlement whereby each member of the Claimant Group would be eligible for a separate $100,000.00 payment could not have been accomplished and thus, had plaintiffs insisted

upon that approach, there would have been no settlement payment at all. Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative.

(5) The fifth group of objections was filed by a few persons who litigated and lost their cases prior to execution of the Settlement Agreement. The defendants were steadfast in their refusal to include these persons. Considering the benefits to the thousands of class members who wish to accept the settlement, the court will not reject the settlement because it does not include these persons.

(6) The sixth category of objectors does not actually oppose the present settlement but seeks instead to link its approval with congressional passage of the "Ricky Ray Hemophilia Relief Act," whereby it is proposed that the federal government would pay $125,000.00 to each person infected with HIV through the use of factor concentrate. Whatever may be the merits of this proposal, it is not the province of the court to engage in efforts to promote passage of legislation in Congress. The court does not find this objection to be a reason for disapproving the settlement.

(7) The seventh and final group of objections is presented by persons who are not citizens of the United States or permanent residents, and are therefore excluded from the class definition. (Since these persons are not class members, they are technically not objectors.) The parties are entitled to determine the parameters of the Settlement Agreement. The court does not consider it unreasonable to limit

> the settlement to United States citizens or permanent residents of the United States, its possessions and territories, and will not reject the settlement based on this objection.

There were separate objections filed by Attorney James Carney, and the court ordered additional submissions in response to these objections. The court has determined that those objections, which were based on Mr. Carney's mistaken belief that there was significant evidence of liability that was unknown to plaintiffs' counsel, are without merit.

11. At the suggestion of plaintiffs' Steering Committee, the court appointed Robert K. Jenner as Guardian Ad Litem to represent class members who are minors or persons under disabilities. Mr. Jenner has represented plaintiffs in this litigation, has written a number of published articles about the legal questions presented and is well qualified to serve as Guardian. He has filed a thoughtful report, analyzing the liability issues and the difficulties of proof. He expresses the opinion that the settlement is fair and recommends it be approved. The report of the Guardian Ad Litem is approved.

12. The settlement does not satisfy everyone. Few class settlements do. But this settlement ends years of litigation and provides redress for thousands of claimants. Subsequent to the November 25, 1996, fairness hearing, the court has received numerous letters from class members supporting the settlement and earnestly requesting that it be approved as soon as possible. The court finds that class members have had an adequate opportunity to consider their individual circumstances, and to decide, in light of those circumstances, whether

their interests are better served by participating in the class settlement or by opting out and pursuing individual claims. The court concludes that the Settlement Agreement among the parties is fair and reasonable for the Settlement Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the settlement is approved.

13. The court orders the respective parties to implement the Settlement Agreement according to its terms.

14. The court finds and hereby orders that all members of the Settlement Class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants and their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the fractionators and distributors for the fractionators, as well as all directors, officers, employees, agents, insurers, and counsel for the foregoing, as well as their predecessors and successors. The release and covenant not to sue shall be for all claims arising out of all injury, disease or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of Factor Concentrate processed or distributed during the period from 1978 through 1985, as described in the Settlement Agreement, and such persons are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants.

15. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement shall constitute or be interpreted to be a finding of the validity or invalidity of any claim or defense or any cause of action alleged or pleaded in the litigation.

16. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement, or any fact, conduct or act involving the settlement proceedings shall be offered or received in any proceeding as evidence, an admission, an inference or presumption, except as may be necessary to enforce or consummate the Settlement Agreement or to support a defense of release or other theory of claim preclusion, issue preclusion or similar defense.

17. The court finds and hereby orders that any person who has heretofore submitted a timely and valid request for exclusion from the Settlement Class will not be bound or affected by the Settlement Agreement or any release or discharge as provided in the Settlement Agreement or in this Final Order and Judgment. The schedule of those persons who have heretofore submitted timely and valid requests for exclusion from the Settlement Class will be filed under seal by the Claims Administrator.

18. The court intends that a separate court order shall be entered regarding attorney fees and reimbursement of expenses to attorneys and law firms representing the Settlement Class. The court finds that the creation of the separate $40 million fund by defendants, from which plaintiffs' attorney fees are to be paid in amounts determined to be reasonable by the court, is fair and

reasonable to the Class. The court reserves its decision as to the allocation of the fund. The separate order for attorney fees and expenses shall not affect or disturb this Final Order and Judgment or any of the findings or orders included in this Final Order and Judgment.

19. Without affecting the finality of this Final Order and Judgment, the court reserves exclusive and continuing jurisdiction over these consolidated actions, the representative plaintiff, the Settlement Class Members, fractionator defendants, and each and all of their respective attorneys and law firms, for the purposes of supervising or determining the implementation, enforcement, construction and interpretation of the Settlement Agreement and all orders heretofore entered, for hearing and determining any motion or application by attorneys or law firms for an award of attorney fees and expenses, and for hearing and determining the final plan of allocation of the settlement.

20. The court finds and hereby orders that this Final Order and Judgment, and all the findings and orders included herein constitute a Final order and Judgment, and the court determines that there is no just reason for delay and directs entry of the Final Order and Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: May 8, 1997

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

FACTOR CONCENTRATE LITIGATION RELEASE

FOR CLAIM NUMBER(S): _____
FOR HIV-POSITIVE PERSON: _____

THIS RELEASE (hereafter the "Release") is entered into as of the date of the last signature below by and between all individuals who have signed this Release (including but not limited to all Releasors identified on Exhibit A attached), (these individuals, including all Claimants and other members of the Claimant's Group, collectively referred to as "Releasors") and ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC FORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC., (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer are hereafter referred to as the "Fractionators" or "Released Parties"]. Releasors and Released Parties are collectively referred to as "the Parties."

WHEREAS, some or all of Releasors may have certain claims arising under their own individual suits (if any)

against one or more of the Released Parties and/or any purported class actions including, but not limited to, the class action suit styled *Walker v. Bayer Corp., et al.*, filed in the United States District Court for the Northern District of Illinois, as Civil Action No. 96C 5024 (these individual and class actions collectively referred to as the "Litigation"); and

WHEREAS, the Litigation against Released Parties seeks damages allegedly sustained by one or more of Releasors as a result of an alleged infection with the HIV virus and other viruses related to plasma factor concentrates and derivatives used for the treatment of hemophilia during the period 1978 through 1985 (hereafter "Factor Concentrates") processed or distributed by any or all of the Released Parties (hereinafter referred to as the "Incident"); and

WHEREAS, Released Parties have denied and continue to deny that they have any liability to Releasors as a result of the Incident or with respect to any claims asserted in the Litigation; and

WHEREAS, the government of the United States of America, certain relevant state governments, and certain private health insurance providers have agreed to release certain rights those governments or insurers have or may have had to reimbursement/subrogation from Releasors and Released Parties for payments made on behalf of any of Releasors to medical treaters through Medicare, Medicaid and/or certain other federal and state funded health care plans and private insurance programs; and

WHEREAS, the Parties, having been provided with notice of and agreeing with and accepting the terms and

provisions of the Factor Concentrate Litigation Settlement Agreement (the "Agreement" with the terms as defined therein being applicable in this Release) approved by The Honorable Judge John Grady in the Litigation currently pending in the United States District Court for the Northern District of Illinois, Eastern Division; and

WHEREAS, Releasors, voluntarily and with full knowledge of their rights and the provisions of this Release, and having had the opportunity to obtain the benefit of the advice of counsel, now wish to settle, compromise, and dispose of the above-described claims and the Litigation, and any other claims that they have or might have against Released Parties related to the Incident upon the terms and conditions set forth below; and

WHEREAS, in the absence of a fully executed Release from Releasors, Releasors will not receive payment under the Agreement or be entitled to any of the other benefits of the settlement. Furthermore, Releasors acknowledge that as to a Claimant or Claimant Group member who does not sign this Release and who pursues a lawsuit against the Fractionators related to the Incident, the Fractionators may assert, and a court may decide, that any such lawsuit is barred by the failure of the Claimant or Claimant Group member to exclude himself from the settlement (to "opt out") prior to October 15, 1996; and

WHEREAS, Released Parties, without any admission of liability, now desire to settle, compromise, and dispose of the above-described claims and the Litigation upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the above premises and the mutual covenants, and intending to be

legally bound thereby, as well as in consideration of the Settlement Consideration set forth below, the Parties enter into the following agreement:

1. Releasors, for themselves, and their heirs, personal representatives, common law and statutory beneficiaries, survivors, successors, subrogees and assigns do hereby forever remise, release, acquit, and discharge Released Parties, and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as all suppliers to Released Parties and distributors for Released Parties, as well as all directors, officers, employees, agents, shareholders, insurers and counsel of each of the foregoing as well as their predecessors and successors, from any and all causes of action and damages (including without limitation damages for emotional injuries), and other liability or relief of any nature whatsoever, past, present or future, whether known or unknown, foreseen or unforeseen, whether in law or in equity, that Releasors ever had, now have, or hereafter may have, by reason of or arising out of any matter, cause, or event occurring on or prior to the date of this Release, arising out of or in any way relating to the Incident. It is expressly understood and agreed by Releasors that this is a full and final release of all matters whatsoever relating to the Incident as to Released Parties and is intended to and does embrace not only all known and anticipated damages and injuries, but also unknown and unanticipated damages, injuries, or complications that may later develop or be discovered, including all effects and consequences thereof.

2. It is the intention of the Parties and is understood by Releasors that this Release will forever bar Releasors

and anyone claiming through them from maintaining any action or claim whatsoever against any and all Released Parties which arose or which might arise in the future from any acts, omissions, agreements, or other occurrences relating to the Incident. The Parties intend that Released Parties obtain through this Release total and final peace, satisfaction and protection from any liability arising from any and all claims of Releasors and anyone claiming through them, whether or not previously asserted; and from any and all claims for joint tortfeasor liability, contribution or indemnity, including claims by any subrogees or assignees of any of Releasors, asserted by any person or entities arising from the Incident or which was or could have been asserted in the Litigation. The Parties further intend to exercise their best efforts to obviate the necessity and expense of Released Parties appearing in and defending any action commenced by any of the Releasors and anyone claiming by or through them asserting claims against any other person or entity arising from the Incident, or which could have been asserted in the Litigation. (Such other unreleased persons or entities are hereafter referred to, along with all subrogees and/or assignees of Releasors, as "Third Parties".)

3. The intent of the Parties is to protect Released Parties to the maximum extent possible, from ~~any~~ liability for contribution or indemnification claims that might otherwise be asserted by Third Parties who have been sued or may in the future be sued by Releasors for the Incident. The effect of this Release shall be to reduce any judgment obtained by any Releasor against any such Third Party by the amount, percentage or share of such

judgment attributable to Released Parties as may be necessary to bar, discharge, and release under applicable law any claims for contribution or indemnification against Released Parties arising from or related to the claims. In the event that any Releasor obtains a judgment against a Third Party and such Third Party obtains a judgment over, in whole or in part, against one or more of Released Parties for contribution or indemnification arising from the claims, then Releasors will be required to reduce or remit any judgment or portion thereof obtained from the Third Parties by the amount of the judgment over against Released Parties. To the extent a judgment obtained against any Third Party for the Incident would result in the imposition of liability for contribution or indemnification against the Released Parties, Releasors agree not to enforce any such judgment. In the event Releasors reach a settlement with Third Parties, settlement documents between Releasors and Third Parties shall provide that the Third Parties relinquish any claims for contribution or indemnification for the Incident against Released Parties.

4. Except as set forth in Paragraph 5 below, Releasors reserve the right to assert claims against all Third Parties, including any of the non-released defendants in the Litigation, and reserve also the right to assert claims that those Third Parties, and not the Released Parties, are solely liable for damages arising from the Incident.

5. Releasors agree to waive, release, and discharge any and all rights they may have to assert claims, causes of action, and administrative or other proceedings arising out of Claimant's use of Factor Concentrates, as defined in the Agreement, including, but not limited to, the use,

administration, regulation, processing, and distribution of Factor Concentrates, against the United States of America, its federal employees, representatives, agents, agencies, and instrumentalities, and each and every individual State, Commonwealth, Territory or Possession which by agreement with the Fractionators has released its claims against Releasors to reimbursement and subrogation related to the Agreement. Releasors do not, however, waive any rights that they may have to any entitlement or right to compensation which may be provided after May 1, 1997 by the legislature of any state, federal or other government.

6. As consideration for this Release, Released Parties will provide as described under Paragraph 7 below compensation to Releasors collectively in one of the following ways: (i) in the amount of One Hundred Thousand Dollars ($100,000) or in such lesser amount as Releasors may be entitled to receive under the Agreement paid to the Total Control Account for Releasors; or (ii) in periodic payments that shall have a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to under the Agreement; or (iii) in the amount of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive paid to the trustee of an "A" or "C" special needs trust for the benefit of Releasors; or (iv) in some combination of (i), (ii) and (iii) having a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement

(such lump-sum amount and such cost of periodic payments, or such combination thereof, are hereinafter referred to as the "Settlement Consideration").

The Settlement Consideration provided by the Released Parties to the Releasors as set forth in this Paragraph is not being credited to the account of any Releasor nor being set apart for the Releasors, nor otherwise made available to Releasors so that they may draw upon it at any time. Rather, Releasors' receipt of such Settlement Consideration is conditioned upon the certification by Special Settlement Counsel that appropriate documentation, including this Release, has been provided by, or on behalf of Releasors to that Special Settlement Counsel, along with court approvals where necessary.

7. Released Parties shall pay the Settlement Consideration in accordance with the terms of the Factor Concentrate Litigation Settlement Grantor Trust (hereinafter the "Settlement Grantor Trust"). This Release shall be effective with respect to the Releasors upon the first to occur of the following transfers:

a) The transfer from Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors of the sum of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

b) The transfer from (i) MetLife Trust Company, National Association, as trustee of the Settlement Grantor

Trust, to Metropolitan Insurance and Annuity Corporation of the sum of One Hundred Thousand Dollars ($100,000) or a lesser amount in accordance with the terms of the Agreement for a Qualified Assignment Agreement and Release, and (ii) to Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors, of the excess of the amount to which Releasors are entitled under the Agreement over the amount transferred under (b)(i), and the interest on the amounts transferred under (b)(i) and this (b)(ii) in accordance with the terms of the Settlement Grantor Trust.

c) The transfer from MetLife Trust Company, National Association as trustee of the Settlement Grantor Trust to MetLife Trust Company, National Association, as trustee of the "A" or "C" trust for the benefit of the Releasors, of the sum of One Hundred Thousand Dollars ($100,000), or such lesser amount as Releasors may be entitled to under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

8. Payment of the Settlement Consideration pursuant to the terms of Paragraph 7(a), (b) or (c) above constitutes full and final settlement payment to Releasors. Following such payment, no further payment or consideration of any kind in connection with the termination and settlement of the Litigation is contemplated or required by Releasors. Released Parties bear no responsibility or liability for any failure on the part of the Special Settlement Counsel and/or the Trustee of the Settlement Grantor Trust to properly allocate among

members of a Claimant Group or distribute the Settlement Consideration. The execution of this Release by Releasors is a material inducement to the Released Parties in paying the Settlement Consideration pursuant to the terms of the Agreement and/or the Release.

9. The Parties agree to execute any and all required supplemental documents and to take all steps which may be reasonably necessary to give full force and effect to the terms of this Release and to effect dismissal of all claims and actions against Released Parties, including the Litigation.

10. Except as otherwise set forth in the Agreement, the Parties shall bear their respective costs and attorney fees. The monetary obligations of Released Parties to Releasors' attorneys are expressly limited to the court approved costs and fees as set forth in the Agreement.

11. Releasors represent and warrant that they have full power and authority to make, execute, and deliver this Release, and that to their knowledge and belief no other individual related to the Releasor has a claim against Released Parties arising out of the Incident related to the undersigned Releasors or which could have been raised in the Litigation, which is not here released.

12. Releasors represent and warrant that they have not sold, transferred, conveyed, assigned, or hypothecated any of their rights, either collectively or individually, in whole or in part, in any of the matters released herein.

13. Releasors represent and warrant that they have had an opportunity to consult attorneys of their own

choice to advise them fully of their rights under this Release and the meaning and effects of this Release and that if any Releasor has not consulted an attorney, that Releasor has knowingly and voluntarily elected not to do so.

14. Releasors represent and warrant that they understand that it is their decision and their decision alone whether or not to sign this Release. Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp. et. al* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same Court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of this Release even if the Agreement were not part of a class settlement but rather a completely private settlement.

15. Releasors represent and warrant that to their knowledge and belief, there are no liens or claims of any kind which have not been discharged by a prior agreement and which could be asserted or made against the Settlement Consideration or against Released Parties as a result of any HIV or AIDS-related medical treatment provided to any Releasor other than those private or public

subrogees who have agreed to waive their claims and are identified in the notice sent with this Release to Releasors. If there are any such outstanding liens, Releasors agree to satisfy those liens from the Settlement Consideration.

16. If any provision or any part of any provision of this Release shall for any reason be held to be invalid, unenforceable, or contrary to public policy or any law, then the remainder of this Release shall not be affected, provided that the portion which is held invalid, unenforceable, or contrary to public policy or law does not constitute a material part of the consideration of one of the Parties.

17. Releasors state that they have carefully read this Release, have signed it as their own free act, and intend to be legally bound thereby. This Release is not subject to any assertion of mistake of fact or law.

18. Releasors declare and understand that no promises, inducements, or agreements not herein expressed have been made to them and that this Release contains the entire agreement among the Parties hereto and that the terms of this Release are contractual, and not a mere recital. Releasors further represent that they are under no legal disability material to their ability to execute this Release.

19. In conjunction with the signing of this Release, Releasors shall also execute the medical release attached as Exhibit B to this Release ("the Medical Release") which will authorize the release of certain medical records necessary for the finalization of the settlement. The Medical Release shall be subject to all of the strict confidentiality

provisions of the Agreement, and will be used for no other purpose than the implementation of this settlement.

20. Because this Release applies to persons throughout the United States, to ensure uniformity in interpretation and to take advantage of a highly developed body of law familiar to the court presently presiding over *In re Factor VIII or IX Concentrate Blood Products Litigation* MDL-986, No. 93-C7452 (N.D. Ill.) and *Walker v. Bayer Corp. et al.*, No. 96C 5024 (N.D. Ill.), which has jurisdiction over all of the Parties, this Release was negotiated with counsel in those cases and shall be construed and interpreted in accordance with the laws of the State of Illinois (excluding Illinois choice of law rules).

21. This Release may be executed in counterparts, each of which is to be an exact copy of the original Release and each of which shall constitute an original, and all of which shall constitute one and the same instrument. This Release shall become effective and binding, subject to all conditions set forth herein, when it has been executed, in counterparts or otherwise, by all Releasors.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Releasors have executed this Release as of the date of the last signature.

PLEASE READ ENTIRE AGREEMENT BEFORE SIGNING

Releasors

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

Notary Public
State of
My Commission Expires:

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

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